IN THE

Supreme Court of the United States.

No. 568 of October Term, 1895.

The Central National Bank of Boston and others,
Plaintiffs in Error,
against
Aaron R. Stevens and others,
Defendants in Error.

Brief of Plaintiffs in Error in Opposition to Motion to Dismiss or Affirm Under Rule 6. Sub. 5.

Statement of the Case on the Part of the Plaintiffs in Error.

The notice of motion is based "upon the annexed printed portions of the record, and the other papers annexed." The grounds of the motion, as stated in the notice, are "that the case does not contain any Federal question," and further "because it is manifest that the writ of error was taken for delay

only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument." (See motion papers, p. i.)

The motion is made on behalf of the defendants in error, The Lebanon Springs Railroad, Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas as Trustee, and Ida S. Harrison." (Id. p. ii.)

But there is no such defendant in error as the Lebanon Springs Railroad. The other persons in whose behalf the motion purports to be noticed, were the plaintiffs below, and are defendants in error here. It appears from certain of the moving papers that a motion was made in the Court of Appeals in which "Edward Winslow Paige, attorney for L. S. R. R. for this motion," joined with Campbell & Paige, attorneys for plaintiffs, in a motion there to dismiss and affirm; that a resolution was passed by the board of directors of the Lebanon Springs Railroad in April, 1894, in which it was recited that that company owned all the interest of the appellants by virtue of a deed of Worthington Frothingham, referee appointed by the Circuit Court of the United States, to William Foster, Jr., and the deed of William Foster, Jr., and wife to this company, that the judgment in this action be affirmed; that the pending appeals be withdrawn; that the president execute, in the name of the company, a stipulation and consent to the

plaintiffs, to the affirmance of the judgments and the withdrawals of the appeals, and to that end, that the president employ and direct counsel for and in the name of the company to consent to and assist in any motion which may be made by the plaintiffs for the dismissal of the appeal, and the affirmance of the judgment. (See motion papers, p. 83.) When and by whom the Lebanon Springs Railroad was organized, or what it is, does not appear. It is supposed to be a New York corporation formed for the purpose of receivng the deeds of the premises in question.

The motion to dismiss and affirm does not appear to have been acted upon by the Court of Appeals. The judgment brought here by the writ of error is simply a judgment of affirmance by the Court of Appeals of the judgment given by theNe York Supreme Court. (See p. 104.) Among the papers presented to the Court of Appeals on the motion to dismiss and affirm, is a deed dated April 25th, 1892, fromWorthington Frothingham, referee named by the decree of the United States Circuit Court, to William Foster, Jr., conveying the railroad premises in question (pp. 92-96), and a deed from William Foster, Jr., and wife to the Lebanon Springs Railroad of the same and other premises. (Pp. 84-91.)

Among the motion papers printed by the counsel for the moving parties, is an affidavit of Alpheus T. Bulkeley, one of the attorneys for the plaintiffs in

error in the court below, in which certain facts are stated which will be referred to more in detail hereafter. It may be stated in the outset, however, that the extracts from the record and the papers furnished to the court on this motion by the defendants in error, present a very inadequate and imperfect view of the case, and the facts therein, and that the questions attempted to be raised cannot be, from the moving papers without reference to the entire record fully or thoroughly understood by the court. If, therefore, the assignment of errors presents questions of which the court has jurisdiction, the motion will be denied. (*Crane Iron Co.* v. *Hoagland*, 108 U. S. 5.)

Enough appears, however, upon the motion papers to show that the case does present a Federal question; that the plaintiffs are interested in that question, and that the question presented to the court, far from being frivolous on the part of the plaintiffs in error, is so clearly sound, that the epithet "frivolous" might more properly be applied to the motion than to the writ of error.

CHRONOLOGICAL STATEMENT.

We give here a chronological statement of the facts so far as the same are necessary for consideration and so far as they may be gathered from the motion papers:

FIRST. *The Sackett suit, so called.*

Mr. Paige gives us nothing with reference to that suit, except what appears in the recitals in the judgment in this action brought here by the writ of error.

It is not conceded that the recitals in this judgment as to the Sackett suit, are correct. On the other hand, a reference to the entire record if it had been brought before the court, would show that these recitals in the judgment which was prepared by the counsel for the defendants in error, was an extremely incomplete, unfair and one-sided statement of the alleged facts. The following facts, however, do appear:

1. The Sackett suit was brought by one Marvin Sackett, claiming to be the owner of bonds issued by the Lebanon Springs Railroad Company, to the amount of $8,700, on the 7th day of September, 1880. (P. 31, fol. 121.) His complaint alleged that he brought the action on behalf of himself and all others, bondholders of the Lebanon Springs Railroad Company, similarly situated, who held any of the two millions of dollars of the bonds of the Lebanon Springs Railroad Company, hereinafter referred to, and who shall be entitled to avail themselves of the benefit of this suit; that he prayed for a sale of the whole of the railroad company and franchises. (P. 31, fol. 123.)

On the 1st day of October, 1880, John W. Van Valkenburgh was appointed receiver. In November, 1880, one Bloodgood and other parties claiming to own a majority of the Lebanon Springs bonds, and who did own more than $300,000 of the same, applied to be made parties to the action, which motion was opposed by the plaintiff and denied 27th November, 1880. The order denying the motion, however, directed the plaintiff to serve copies of all papers and notices of every kind on the petitioners' counsel, one F. L. Westbrook, who was by the order authorized and allowed to appear as counsel on behalf of the said Bloodgood and the other six bondholders upon all trials, hearings and motions. This order was made January 10, 1881.

November 6th, 1880, Park and Duncan applied as bondholders to be made parties. Their application was opposed by the plaintiff, was heard on the 27th November and 10th December, 1880, and was not granted. (P. 33, fol. 131.)

One Henry A. Tilden who claimed to own thirty Lebanon Springs bonds, was associated with Sackett in the bringing of this suit, and retained the Hon. Hamilton Harris as counsel therein, and assumed to control the action. (Fol. 132.)

February 23, 1881, the receiver verified a petition, to the court, for instructions. (P. 33, fol. 132.) On the presentation of this petition, March 5, 1881, an order was made appointing one Jones,

an expert, to examine the railroad. Jones made his report March 19, 1881. The report of Jones was presented to the court by the receiver, and after hearing counsel for the receiver, no one else appearing, he was ordered to issue certificates of indebtedness to the amount of $350,000, to bear interest at six per cent. and to be a first lien upon the property. This order also appointed a referee to hear and determine all existing claims against the Lebanon Springs Railroad. This order was filed April 4, 1881.

The Sackett suit was brought at the request and with the concurrence of holders of Lebanon Springs Railroad bonds amounting to about $1,200,000 (p. 37, fol.145), and other persons owning about $500,000 of such bonds were also associated with the plaintiff Sackett and represented in that suit by Sackett's attorney and counsel. (Fols. 147 to 149.) The entire issue of these bonds was $2,000,000. (P. 10, fol. 37.)

Various other proceedings in the Sackett suit occuring during the years 1880 and 1881, and being matters of record in the Supreme Court of the State New York of those dates, are recited in the judgment (pp. 34, 35, fols. 134-138), by which the court ordered various payments aggregating about the sum of $35,000 to be made to the plaintiff, plaintiff's attorneys, to counsel for the receiver and to various persons presenting claims against the Leb-

anon Springs Railroad Company. The largest o these items was a claim of Henry A. Tilden for $25,267.37, presented June 29, 1881. (Motion papèrs, pp. 34, 35.)

These claims were all allowed by the referee on the 5th of July, 1881. No objection to these claims or to their payment seems to have been made by any of tne parties to the action or any person interested in the railroad. The record shows, although the moving papers do not, that the decisions of the referee upon these various claims were all confirmed by the court, and that the amounts so allowed were paid by the receiver out of the funds which were the avails of the receiver's certificates.

It is the payment of these claims that constitutes the supposed fraud on account of which the judgment herein vacates and sets aside the judgment in the Sackett suit. There is no pretence that the plaintiffs in error or any certiffcate holder knew of any of these payments or derived any benefit therefrom.

The action was noticed for trial on the 23rd day of September, 1884. The trial was had pursuant to such notice, October 10, 1884, at which appeared counsel for the plaintiff, counsel for the Central National Bank of Boston, and other certificate holders, and the Hon. Hamilton Harris, who had been retained by Henry A. Tilden, for the plaintiff, and had also received from F. L. Westbrook authority

to represent him. (P. 35, fols. 139, 140.) The judgment in the Sackett suit, although contained in the record, is not among the papers presented to the court on this motion, but is a part of the appeal record. It appears, however, that it directed a sale of all the railroad and property contained in the State of New York, subject to the principal of the receiver's certificates, and directing the purchase money to be applied in payment, first, of certain counsel fees and expenses of the receivership, and next the interest due on the receiver's certificates, the certificates not being due, and directing any balance to be paid into court. (Pp. 35 and 36, fols. 140, 141.)

The judgment in the Sackett suit was entered the 27th of January, 1885. The premises were sold to William Foster, Jr., as trustee, for $155,000 cash (p. 36, fol. 141), on the 12th day of June, 1885, acting on behalf of himself and Rowland N. Hazard. (p. xi, fols. 31, 32), the purchaser, assuming the payment of the certificates.

SECOND. *The certificate holders' suit.*

In April, 1886, plaintiff in error, The Central National Bank of Boston, suing for itself as well as for all others similarly situated, brought an action in the New York Supreme Court in Rensselaer county against Rowland N. Hazard, William Foster, Jr., The New York Rutland & Montreal Railway

Company and The American Loan & Trust Company of New York defendants. The complaint in this suit may be found pages v to xv of the moving papers. It set up the issuing of receiver's certificates in the Sackett suit under the order of April 2, 1881 (p. v); that the receiver duly issued and negotiated certificates of indebtedness in the manner and form by said order provided to the amount of $350,000, and that he duly applied the moneys received from the said certicates to the uses and purposes in the said order mentioned and authorized (pp. viii and ix, par. III of complaint); that the plaintiff was at the time of bringing the action, and had for several years last past, been the holder and owner of said certificates amounting in the aggregate to $250,000 of principal thereof (p. ix, par. IV); that the receiver's certificates not held by the plaintiff, were held by divers persons and corporations, many of whose names are unknown to plaintiff (p. ix, par. V); that in the Sackett suit the plaintiff appeared on the trial of the issues therein, made proof in regard to the issuing of the receiver's certificates, and its title thereto, and that such proceedings were had in said action; that judgment was rendered January 12, 1885, whereby it was among other things adjudged and decreed that the said certificates of indebtedness issued by said receiver, amounting in the aggregate to $350,000, were ratified and confirmed and declared to be a first lien on the said railroad

and its property as provided in the said above-mentioned order, and as stated in said certificates for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in the said judgment provided, whereby it was further adjudged and decreed that the property, franchises and rights of the Lebanon Springs Railroad Company, and all the right, title and interest of any and of all the parties thereto, be sold at public auction by George McClellan, Esq., referee, for the benefit of the first mortgage bondholders of the railroad company, and that said sale be made subject to the payment of the undue principal and interest of the receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and that said purchaser or purchasers should assume, as part of the consideration of said purchase, the payment thereof, and that from the avails of said sale, after the payment of cerain other expenses therein provided for, the said referee should pay the amount of interest due on said receiver's certificates. (Pp. ix and x, par. VI.) The complaint further alleges a sale under and in pursuance of the judgment in the Sackett suit, and that the defendants William Foster, Jr., and Rowland N. Hazard became the purchasers thereof for the price or sum of $155,000,

that being the highest sum bid therefor, and that the said defendant William Foster, Jr., acting on behalf of himself and the defendant Hazard, then and there paid five per cent. of the purchase money, and did by his attorney subcribe a certain contract of sale, which was also subscribed by the referee, whereby, among other things, he for himself and said Hazard assumed and agreed to pay the amount of unpaid principal and interest on the said receiver's certificates, as part of the consideration of the purchase; that the balance of said sum of $155,000 was thereafter paid by the said purchasers to the said referee, and the said referee did thereafter duly execute and deliver to the defendants Foster and Hazard, a deed of said premises and property in the judgment described, and the referee, from the said sum of $155,000 paid the interest due on the receiver's certificates amounting to about $60,000 (p. xi, par. VII); that this referee's deed was accepted by the defendants Foster and Hazard, and duly recorded in the county of Rensselaer, and that in and by the deed, the grantees took the property subject to the said unpaid principal and interest on the receiver's certificates as required by said judgment. (Pp. xi, xii, par. VIII.)

That the principal of the certificates with interest from the 1st day of January, 1886, became due and payable on the 2nd day of April, 1886, and on that day the said certificates held by plaintiff,

amounting to $250,000, were duly presented to the Farmers' Loan & Trust Company of the city of New York, where they were payable, and payment thereof demanded, but the same was refused, and that the whole of the said principal with interest from the 1st day of January, 1886, was then due and unpaid. (P. xii, par. IX.)

The complaint then proceeds to give a description of the premises as described in the judgment, and in the said referee's deed (pp. xii to xiv, par. X); alleges that the defendants or one or some of them are now in possession of the premises and property described, and are using and operating the same for railroad purposes, and that all the defendants have, or claim to have, some interest in or lien upon the said premises or some part thereof, which interest or lien has accrued subsequently to the lien of the certificates. (P. xiv, par. XI.)

That there is now justly due plaintiff upon the certificates held by it the sum of $250,000, with interest from the 1st day of January, 1886. (P. xiv, par. XII.)

The relief prayed for in the complaint is substantially as follows: That the unpaid principal and interest of said receiver's certificates may be adjudged to be a lien upon the premises described in the hands of the purchasers, and of any persons claiming through or under the purchasers on said referee's sale; that the defendants and all persons

claiming under them or either of them subsequent to the commencement of this acttion, may be barred and foreclosed of all right, claim or lien and equity of redemption in the said premises; that a receiver be appointed; that the premises or so much thereof as may be sufficient to raise the amount due to the plaintiff and to the other holders of said certificates for principal and interest, may be decreed to be sold according to law; that out of the moneys arising from the sale, the plainiff and other holders of certificates who may come in and prove their title thereto and the amount due thereon, may be paid the amount due on said certificates with interest to the time of payment, and the costs and expenses of the action so far as the amount of such moneys properly applicable hereto, will pay the same, and that the defendants Rowland N. Hazard and William Foster, Jr., may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto, and for other and further relief. (Pp. xiv, xv.)

Answers were interposed by the various defendants. Defendants Hazard and Foster appeared by their attorneys, Vanderpoel, Green & Cuming. Their answer may be found pages xiv to xix. Their answer denied various allegations of the complaint, and alleged that they were willing to pay the amount justly due on account of the receiver' certificates to the persons lawfully entitled to receive

payment thereof; that when the property came into their hands, it was subject to a lien for the amount actually due to the receiver and his successor, but for no other or greater amount (p. xviii, fol. 54); that in accepting the deed, the defendants intended only to obligate themselves to pay the amount actually due the receiver on said certificates with proper interest, and no other or greater sum by way of profit, and they ask that either the complaint be dismissed with costs or that an accounting be had in the premises to determine what, if any, liens are on the property, and in whose favor, and that the defendants might be fully assured and protected for any payments for or on account of said receiver's certificates. (P. xi, fol. 56.)

The defendant The New York, Rutland & Montreal Railway Company answered by its attorney, Robert Ludlow Fowler. Its answer may be found, pages xx to xxvi of the moving papers. It alleged that defendants Hazard and Foster did not acquire the property described in the complaint subject to a lien for a sum greater than that justly due to the *bona fide* first takers of the said certificates and alleged that that amount had never been ascertained by any judicial inquiry, and that it had never been ascertained who were the *bona fide* first takers for value of said receiver's certificates. (Pp. xx to xxii, par. V.) It denies most of the material allegations of the complaint and sets up the proceed-

ings in the Sackett suit; alleges that the receiver issued 500 of the certificates in question, of the par value of $500 each, in violation of the order of April 2, 1881, to one Edward Crane, as his agent, without consideration; that Crane pledged or hypohecated such 500 certificates with the Pacific National Bank of Boston, to secure a loan made to said Crane. Subsequently, said Crane is said to have paid over to said receiver a portion of the sums so realized by him, but said property described in the complaint became liable by reason thereof only for the sums actually so received by its receiver in the aggregate, a sum greatly less than the face of said certificates (pp. xxii and xxiii, fols. 66 to 68); that the certificates so issued to Crane may be those claimed to have passed to the plaintiff at or about the time when the Pacific National Bank became grossly insolvent, and it alleges that if they have so passed to the plaintiff bank, it is as collateral for some debt or claim due to the plaintiff by said insolvent Pacific National Bank or by said Crane or by some other intermediary, and not for value then or ever paid by the plaintiff bank, and that the plaintiff can in any event have no rights in respect thereto superior to those of the Pacific Naional Bank. (Pp. xxiii, fols. 68, 69.) It admits that the certificates issued by the receiver were a charge on all the property in the hands of the receiver for the amount actually paid for said certificates or advanced thereon by the first

holder with interest, but for no more than such sums with interest. It also alleges the subsequent discharge of Van Valkenburgh, as receiver, and that one William V. Reynolds succeeded him, who acquired the property subject to the lien of the receiver's certificates; that the property was brought to a judicial sale in the Sackett suit, and purchased by the defendants Hazard and Foster, and that afterwards the said Hazard and Foster conveyed all the property and franchises precisely as conveyed to them by McClellan, the referee, to the answering defendant (The New York, Rutland & Montreal Railroad Company) subject to the payment of the sum justly due by said receivers, but subject to no greater sum than that due by said receivers to the first holder or holders of said certificates. (P. xxiv, fols. 71, 72.) It also avers that the defendant is ready and willing to pay the sums justly due by the said receivers to the persons lawfully entitled thereto, but that the plaintiff is not entitled to receive payment, whoever else may be. (Pp. xxiv to xxv, fols. 72, 73.) It is also averred, among other things, that in accepting the deed from Hazard and Foster, it intended only to pay the amount actually due from the receiver on the said certificates with proper interesst and no other or greater sum by way of profit (p. xxv, fol. 74), and that it acquired said property subject to no greater lien in favor of any holder of receiver' certificatess than existed against the property

in the hands of the receiver, and that that amount the defendant stood ready and offered to pay to the persons so justly and legally entitled.

This answer asked as relief that the complaint be either dismissed with costs or else that an accounting be had in the premises to determine what amounts are a lien on the property, and in whose favor, so that the defendant may be fully assured and protected, &c.

The defendant The American Loan & Trust Company (of New York) answered by Blair & Rudd, its attorneys, alleging that it was a mortgagee of the premises under a mortgage executed by the defendant The New York, Rutland & Montreal Railway Company (p. xxvii, fol. 81), the issuing of bonds secured by said mortgage to the amount of $1,400,000 or thereabouts (p. xxviii, fol. 83), and alleging substantially that it appeared to protect the rights of the bondholders for whom it was trustee, praying that the amounts due to the plaintiff and other holders of receiver's certificates might be ascertained, and that the defendant might have an opportunity to pay the sums so ascertained and established, and for other or further relief. (P. xxix, fol. 86.)

The defendants afterwards on the 17th of September, 1886, all joined in a petition for the removal of the suit into the Circuit Court of the United States for the Northern District of New York. (See extracts from removal papers, pp. xxxi to xxxvi.)

Testimony on behalf of the complainant and defendants was taken in Albany and in Boston, and the case came on for hearing before Judge Wallace, and was argued by counsel for complainant and also by Messrs. Robert Ludlow Fowler and Thomas G. Shearman, of counsel for defendants. A decree was then made, to be found in the moving papers. (Pp. xxxvi to xli.) Inasmuch as a disregard by the State courts of this decree and an attempt to interfere with and practically to reverse it under the form of an injunction restraining the complainants therein from enforcing it, is the principal ground of error alleged herein: the said decree, omitting the description, is herewith again presented.

DECREE OF UNITED STATES CIRCUIT COURT IN FAVOR OF PLAINTIFFS IN ERROR, CERTIFICATE HOLDERS.

"At a Special Term of the Circuit Court of the United States in Equity sitting, held in and for the Northern District of New York, at the Chambers of the Circuit Judge in the City of Syracuse, on the 24th day of March, 1887.

Present: Hon. William J. Wallace, Circuit Judge.

THE CENTRAL NATIONAL BANK of Boston, which sues as well for itself as for all others similarly situated.	
vs.	
Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York.	

This cause came on to be heard at this term, and was argued by Messrs. Henry D. Hyde and Matthew Hale, of counsel for complainant, and by Messrs. Robert Ludlow Fowler and Thomas G. Shearman, of counsel for defendants, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed as follows:

That the certificates of indebtedness issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2nd day of April, 1881, made in an action in said Supreme Court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described

in the bill of complaint herein, in the hands of the defendants herein, and of any persons claiming through or under the defendants Rowland N. Hazard and Willaim Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said Supreme Court on or about the 12th day of January, 1885; and that the complainant The Central National Bank of Boston is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000, of principal thereof, upon which there is now due and unpaid to the complainant the said sum of $250,000, with interest at the rate of six per cent. per annum thereon, from the 1st day of January, 1886.

That it be referred to William Lansing, Esq., of the city of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain and report who are the holders other than the complainant of said certificates of indebtedness, and how much remains due and unpaid theron. And the said master is hereby authorized and directed to give notice by advertising in two daily newspapers published in the city of Albany in said district, requiring the holders of said certificates to produce the same before the said master at his office in the city of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as

to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain and report what would be the just proportion and amount for the said other holders of said certicates to contribute to the expenses of this suit.

That the premises and property described in the bill of complaint in this cause, as hereinafter set forth, or such part thereof as is sufficient to satisfy the amount due and unpaid on said certicates, and expenses of sale and costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the county of Rensselaer, in said district, by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a referee for said purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that the complainant or any other party to this suit may become a purchaser on such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said referee pay to the complainant or its solicitors the amout of its costs and disbursement to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid;

together with the interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other of said certificates respectively the amount of principal and interest due thereon, as the same may be found and reported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said referee pay and distribute the said moneys after the payment of the fees, expenses, costs and disbursements above mentioned, to the said certificate holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate holders respectively; that the said referee bring the surplus moneys arising from the said sale, if any there shall be, into court within twenty days after the same be received, to be there subject to the order of the court; that the said referee make a report of such sale, and file the same with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate holders the amount due to them respectively, as may be ascertained by said master as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendants Rowland N. Hazard and

William Foster, Jr., pay to the complainant, and to the other of said certificate holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate holders, to be ascertained as aforesaid, have execution therefor; and that the purchaser or purchasers at such sale be let into possession on the production of the said referee's deed and a certified copy of the order or decree confirming the said referee's report of sale.

And it is further ordered, adjudged and decreed, that the defendants and all persons claiming under them or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said premises so sold or any part thereof. The following is a description of the premises and property hereinbefore referred to and hereby directed to be sold, as contained in a certain mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the deed executed by George McClellan, referee, to the defendants William Foster, Jr., and Rowland N. Hazard, referred to in the bill of complaint herein:

(Description.)

Leave is hereby reserved to the complainant and

to the other certificate holders above referred to, or any of them, to apply upon the foot of this decree for the appointment of a receiver to take immediate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by receivers in such cases.

WM. J. WALLACE."

THIRD. *Proof of certificates in the United States Circuit Court.*

The report of William Lansing, master *pro hac vice*, appointed by the decree of the United States Circuit Court, may be found at pages xlii to l of the printed motion papers, from which it appears that the various certificate holders made their proofs before the master, which were reported by him to the court. If the entire record were printed, it would show that this report was duly confirmed by the U. S. Circuit Court.

FOURTH. *The sale under the United States Circuit Court decree.*

The State court having granted the injunction, contained in the judgment now before this court enjoining the complainants from causing or suffering

a sale to take place under the United States Circuit Court decree, application was made by Mr. Peter Butler, then receiver of the Pacific National Bank, since deceased, for an order requiring the referee appointed by the United States Circuit Court decree to proceed with the sale notwithstanding the injunction contained in the judgment of the New York Supreme Court. The papers on this motion, which was of course, made after the rendition of the judgment which is brought before this court by writ of error for review, are not presented in the motion papers, but such papers do contain the opinion of Judge Wallace in granting the motion, which may be found at pages 74 to 80.

FIFTH. *Contempt proceedings.*

Application was promptly made by the counsel for the plaintiffs in this action, to punish Mr. Butler and the other certificate holders for contempt in violating this injunction. Those proceedings are, of course, no part of the record in this case. The moving counsel, however, produces exemplified copies of two certain orders which he causes to be called final orders (p. 123, fol. 415), dated, the first order April 2nd, 1893, and the other September 19th 1895, which were filed in the office of the clerk of the New York Supreme Court for Albany county on the 23rd day of September, 1895 (p. 127, fol. 428), by one of which it is ordered that

the application to punish the certificate holders other than Mr. Butler, be denied and the proceedings dismissed (p. 125, fol. 422), and by the other of which "it appearing to the court that the said Peter Butler has died, it is ordered that the said application be and is hereby denied, and the proceedings dismissed." (P. 127, fol. 427.)

It will be noticed that these orders were filed long after the writ of error, dated March 7th, 1895, and the return thereto, had been filed with the clerk of this court.

The certificate is that they were filed September 23, 1895. Counsel for plaintiffs in error never learned of them until copies of the papers on this motion were served upon them.

Counsel does not produce the petition or application on which the motion to punish for contempt was made, or anything from which the court can judge whether these orders are or are not to be considered as adjudications binding upon the plaintiffs in error.

SIXTH. *The Stevens suit.* (This action).

The judgment which is brought before this court for review by writ of error, was rendered in an action commonly known as the Stevens suit. The counsel brings before this court, on his motion, nothing but the judgment rendered by the Supreme Court in this suit November 10, 1891. Neither the com-

plaint nor the answers of any of the defendants are brought before the court on this motion. It is recited in the judgment, however, that the notice of the pendency of action in the suit was filed on the 10th day of October, 1887, and that other notices of pendency of action were subsequently filed on the 24th of September, 1888. The judgment is dated November 10, 1891 (pp. 1 and 2, next after the pages marked with letters).

Under the practice then prevailing in the State of New York, various requests for findings of fact and decisions upon questions of law were filed with the court, and marked with its approval or disapproval, which, if presented to the court, would show many material matters which do not appear from the papers printed in behalf of this motion. It appears from the printed papers (although not from the record) that a motion was made before the learned justice of the Supreme Court, who rendered the judgment, to strike therefrom the portion thereof enjoining the plaintiffs in error from enforcing their decree in the United States Circuit Court (see pp. 57 to 70, fols. 219 to 258), but such motion was not granted. (P. 70, fol. 258.)

Assignment of Errors.

The assignment of errors may be found on pages 117 to 122 of the motion papers. It recites that the plaintiffs in error claimed that they were entitled

in the Court of Appeals of the State of New York to a reversal of so much of the judgment of the Supreme Court of the State of New York as adjudged that the plaintiffs in error, the Central National Bank and others, naming them, and all owners of the said receiver's certificates, are perpetually enjoined and restrained from proceeding with the sale under the decree rendered by the Circuit Court of the United States above set forth (fols. 399 to 401), and also to a reversal of so much of said judgment as perpetually enjoined and restrained all the owners of any of the said receiver's certificates from proceeding with any action or proceeding in any court whatever to enforce any lien upon or for the sale of said premises (fols. 401, 402), and also to a reversal of so much of the judgment of the Supreme Court of the State of New York as required the referee named therein to ascertain, determine and report from the evidence and findings, and such other evidence as might be furnished him, who are the holders of the certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon the same, &c., and assigns as error in the judgment of the Court of Appeals, affirming the judgment of the New York Supreme Court.

1. That it did not give due validity and effect to the decree of the Circuit Court of the United States above set forth.

2. That it erred in perpetually enjoining and

restraining the plaintiffs in error from proceeding with the sale under the said decree.

3. That it erred in enjoining and restraining all owners of any of the said certificates described, from proceeding with any action or proceeding in any court whatever to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers in said judgment described, and from suffering any such action or proceeding to be brought or prosecuted.

4. That the court erred in requiring the referee named in the judgment to ascertain and report upon the evidence taken upon the trial and the findings of the court, and such other evidence as might be furnished him, who other than the plaintiffs in the said action are the holders of the bonds issued by the Lebanon Springs Railroad Company and Harlem Extension Railroad Company.

5. That the court also erred in providing in said judgment that the said referee ascertain and determine and report from the evidence and findings and such evidence as might be furnished him, who are the holders of the said certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon them, such facts having been found, ascertained and determined by the said Circuit Court of the United States under said decree.

6. That it erred in requiring the holders of said certificates, including the plaintiff in error, to pro-

duce their certificaes before said referee and make proof as to their title thereto, and the amount due thereon; whereas, said facts as to the title to said certificates and as to the amount due thereon, had been conclusively ascertained in and pursuant to the said decree of the Circuit Court of the United States.

7. That the court below erred in refusing to find as requested by the plaintiffs in error, that the receiver's certificates held by the defendants in said action (plaintiffs in error here) are as against all the parties to the action, and all the holders of the bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the railroad and premises described in the complaint, as adjudged by the Circuit Court of the United States in its said decree.

8. That the court also erred in refusing to find as requested by the plaintiff in error that if any sale be made under the judgment in said action, it should be subject to the rights of the defendants The Central National Bank of Boston, and the other certificate holders, plaintiffs in error herein, and that said certificates should be paid to said certificate holders first out of the proceeds of any sale that might be had therein. (Pp. 119 to 122, fols. 404 to 412.)

Also that the Court of Appeals should have reversed so much of the judgment of the Supreme Court of the State of New York, as in any way im-

pairs the rights of the plaintiffs in error or any or either of them under the said decree of the Circuit Court of the United States, or in any way enjoins, restrains or prevents the plaintiffs in error or any or either of them from enforcing said decree or from having or enjoying the full benefit thereof. (P. 122, fol. 412.)

POINTS ON BEHALF OF PLAINTIFFS' IN ERROR.

FIRST. IT IS CLEAR THAT THE CASE PRESENTS FEDERAL QUESTIONS, OF WHICH THIS COURT HAS JURISDICTION.

1. The decision of the court below refuses to give due effect to a judgment or decree of a United States court.

(a.) This is a Federal question within the jurisdiction of the United States Supreme Court, on a writ of error, to the highest court of the State. (*Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141.)

As was said by Mr. Justice Bradley, in delivering the opinion of this court:

Where a State court refuses to give effect to the judgment of a court of the United States, rendered upon the point in dispute, and with jurisdiction of

the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States as defined by the constitution; and it is clearly within the chart of appellate power given to this court over cases arising in, and decided by, the State courts. (*Dupasseur* v. *Rochereau*, 21 Wall. 130, 134; *Embry* v. *Palmer*, 107 U. S. 3; *Crescent Live Stock Co.* v. *Slaughter House Co.*, 120 U. S. 141.)

(b.) In this case the judgment of the court below, as rendered, directly and expressly attempts to nullify a decree of the United States Circuit Court.

(1.) The decree of the United States Circuit Court declares the receiver's certificates to be a lien upon the premises and property described in the complaint in the hands of the defendants in that suit or of any persons claiming under them. The judgment in this suit attempts to defeat the said lien and subordinate it to the rights of others.

(2.) The referee named in said decree of the Circuit Court is directed to give public notice of sale and to sell the premises described in the decree,

which are the same as the premises described in the complaint in this action. The judgment in this case perpetually enjoins the certificate holders from proceeding with the sale, and " from suffering said sale to proceed in their or any of their names or behalf."

(3.) The decree in the Circuit Court provides that, in case of any deficiency, the defendants, Hazard and Foster, shall pay to the complainant and the other certificate holders the residue of the indebtedness on said certificates remaining unsatisfied *after the sale* of said property. The judgment in this case deprives us of the benefit of that part of the decree by perpetually enjoining a sale, and thus defeating the personal decree against Foster and Hazard.

(4.) The United States Circuit Court decree, as against all the parties to that suit, takes possession of the property and premises described therein for the purposes of such decree. They were until the sale under said decree, as against those parties, and for the purpose of that suit, in the possession and under the control of the United States Circuit Court. This possession is good as against the world. It is a complete defense to any claim made in a State court to the property in question. (*Covell* v. *Heyman*, 111 U. S. 176, and cases cited; *Rio Grande*

Railroad Company v. *Gomila*, 132 U. S. 478; *Central National Bank* v. *Hazard*, 49 Fed. Rep. 293; Opinion of Wallace, J., motion papers, p. 74.)

(5.) The decree in the United States Circuit Court adjudges that the complainant, the Central National Bank of Boston, is the holder and owner of certain of said certificates amounting in the aggregate to $250,000 of principal thereof, and adjudges the amount due and unpaid thereon. (Motion papers, p. xxxvii, fol. 110.) It also provides for proof by the other certificate holders of their certificates and the amount due thereon before a master *pro hac vice* named in said decree. (Fol. 111.)

The judgment of the New York Supreme Court now brought before this court, requires the referee named therein to ascertain, determine and report from the aforesaid evidence and findings, and such evidence as shall be furnished him, who are the holders of the said certicates issued by the said receiver Van Valkenburgh, and how much has been paid upon said certificates, and directs him to give notice by advertising in two newspapers published in the State of New York, to the holders of certificates, to produce the same before him, and make proof as to their title thereto, and the amount due thereon. (Motion papers, p. 46, fols. 181-183.)

The referee named by the State court is thus authorized upon the evidence and findings in the

Sackett suit, "and such other evidence as shall be furnished him," to determine who are the holders of the receiver's certificates and how much is due thereon. No force or effect is given to the decree of the United States Circuit Court. The whole matter is opened and subjected to the determination of the referee appointed by the State court, as if there had never been any determination of the matter in the Federal Court. (See assignments of error 5, 6, pp. 120, 121, fols. 408, 409.)

(6.) The trial court was requested by the plaintiffs in error to find in accordance with the decree of the Circuit Court that the receiver's certificates held by the plaintiffs in error were as against all the parties to that action, and all holders of the bonds of the Lebanon Springs Railroad Company, including the plaintiffs below, a first lien on the railroad and premises, as adjudged by the Circuit Court, and also that if any sale should be made under the judgment in said action, such sale should be subject to the rights of the plaintiff in error, and should be first paid out of the proceeds of sale. These requests and the rulings thereon appear in the record, but are not presented to the court by the motion papers. They are the subject of the 7th and 8th assignments of error (p. 121), and under the rule laid down in *Crane Iron Co.* v. *Hoagland*, 108 U. S. 5, the errors assigned must be presumed to appear in the record.

(7.) It is not at all material that the suit of the Central National Bank of Boston was originally brought in the New York Supreme Court and removed into the United States Circuit Court by the defendants therein. It is conceded, and found by the court below, that the United States Circuit Court acquired jurisdiction. The case was carried to that court by the very defendants for whose benefit the injunction was inserted in the judgment and is now insisted on. After the removal, the defendants appeared in the United States Circuit Court and put in their defense, which was by that tribunal overruled. We only asked that the State court would give "due faith and credit" to the decree of the Federal tribunal, duly made in that suit, which it could not do without reversing the judgment appealed from, so far as it undertakes to enjoin the plaintiffs in error from enforcing the decree in their favor made by the United States Circuit Court.

SECOND. THE FEDERAL QUESTIONS PRESENTED BY THE PLAINTIFFS IN ERROR, FAR FROM BEING FRIVOLOUS, ARE SUSTAINED BY THE REPEATED DECISIONS OF THIS COURT COVERING A PERIOD OF MORE THAN EIGHTY YEARS.

The judgment in this case contains the following clause:

"That the defendants, the Central National Bank of Boston (and naming the other certificate holders), and all other owners of certicates issued by the said Van Valkenburgh, as receiver, as aforesaid, and each of them, and their and each of their officers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from proceeding with the sale under the decree in the action brought by the defendant, the Central National Bank of Boston, against the defendants, Hazard, Foster, the New York, Boston and Montreal Railway Company and the American Loan and Trust Company, a copy of which is attached to the answser of the Central National Bank of Boston in his action, and from suffering said sale to proceed in their or any of their names or behalf." (Fols. 659-663.)

1. The decree of the United States Circuit Court was made March 24, 1887, has not been appealed from, but stands unreversed and in full force.

By that decree, certain rights are given to the complainant therein and the other holders of receiver's certificates represented by the complainant. A sale of the premises described in the decree was adjudged, and in case of a deficiency, two of the defendants, Foster and Hazard, were made personally liable, and directed to pay any deficiency that might remain to the complainant and other certificate holders, so as to pay their certificaes in full. (See decree on p. 55 of case.) Of course it will appear by a bare inspection of the decree that the right

of the complainant to a personal judgment against Hazard and Foster depends upon a sale of the premises under that decree and a deficiency, after the application of the proceeds of sale to the payment of the certificates.

The judgment of the court in this action, if valid, absolutely deprives the complainant in that suit and the other certificate holders of their right, adjudged by the Circuit Court of the United States, to compel Hazard and Foster to pay this deficiency.

It virtually deprives the certificate holders of the benefit of that decree, and this, at the suit of outside parties, who claim not to have been affected in any respect by the decree in the United States Circuit Court.

This judgment attempts to, and, if valid, does, practically, so far as any benefit to the parties to the suit in the United States Circuit Court is concerned, annul and reverse the decree of that court.

No pretense is made that the Circuit Court of the United States had not jurisdiction of the case. The action was brought in the New York Supreme Court, but was removed to the United States Circuit Court by the defendants therein, and, as the court below has found was so duly removed. The defendants in that action all appeared and answered, and were heard in the United States Circuit Court. The referee named in that decree was at the time of the commencement of this action advertising the

property and franchises described in the decree for sale, pursuant to the rules and practice of the court, all of which have been found as facts by the trial court herein in the forty-sixth and forty-seventh findings of facts as will appear by reference to the record herein, though these findings are not contained in the motion papers.

2. The New York Supreme Court had no power to enjoin the enforcement of a decree of the United States Circuit Court, by judgment or otherwise.

Its judgment, so far as it attempted to enjoin the enforcement of the decree in the United States Circuit Court, is absolutely void and of no effect. The authorities under this head are abundant.

(a.) In *McKim* v. *Voorhis* (7 Cranch, 279), decided in 1812, Mc Kim, a citizen of Maryland, had recovered a judgment in ejectment against Voorhis, a citizen of Kentucky, in the Circuit Court of the United States. Voorhis filed a bill in the Kentucky State court, and obtained an injunction staying all further proceedings on the judgment. The Supreme Court of the United States held that the State court had no jurisdiction to enjoin a judgment of the Circuit Court of the United Sates.

(b.) *Riggs* v. *Johnson County* (6 Wall. 166). The plaintiff had obtained a judgment in the United

States Circuit Court for the district of Iowa, and issued execution, which was returned unsatisfied. After the return of the execution, an Iowa State court granted an injunction perpetually enjoining the county officers from levying a tax to pay the judgment. Notwithstanding this injunction, the plaintiff applid to the United States Circuit Court for a mandamus to the county comimssioners to compel them to levy a tax sufficient to pay the judgment. The commissioners answered making as a return the injunction previously laid on them by the State court. The plaintiff demurred to the answer, assigning four causes of demutrer, the substance of the one chiefly relied on being that after the judgment was rendered in the Circuit Court, the State court had no jurisdiction, power or authority to prevent him from using the process of this court by mandamus to collect his judgment. The Circuit Court overruled the demurrer, and a judgment was given for the commissioners; but this court on error, held that the demurrer should have been sustained, and that the State court had no jurisdiction to grant the injunction. The subject was very fully discussed by Mr. Justice Clifford, who wrote the opinion in the case. It is stated by him that "if the power is conferred to render the judgment or enter the decree, it also includes the power to issue the proper process to enforce such judgment or decree." (P. 187.)

It is expressly determined " that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied." (P 187.) "Process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the constitution." (P. 187.)

Again, it is held in the same case:

Authority of the Circuit Courts to issue process of any kind which is necessary to exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot be controlled either by the process of the State courts, or by any act of a State legislature. (P. 194.)

Again, it is said:

State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit Courts and State courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them " was traced by landmarks and monuments visible to the eye." Appellate relations exist in a class of cases between the State courts and this court, but there are no such relations between the State courts and the Circuit Courts.

Viewed in any light, therefore, it is obvious that

the injunction of a State court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action, Circuit Courts are wholly independent of the State tribunals. (Pages 195, 196.)

This principle has ever since been maintained in this court. *United States* v. *Council of Keokuk*, 6 Wallace, 514; *Mayor* v. *Lord*, 9 Wall. 409; *Supervisors* v. *Durant*, id. 415; *Amy* v. *Supervisors*, 11 Wall. 136.

In the case of *Mayor* v. *Lord*, *supra*, it is said by Mr. Justice Swayne:

It is not competent for a State tribunal thus to paralyze the process issued from a court of the United States to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the national courts, and has heretofore been applied by this tribunal, upon the fullest consideration, in other cases presenting the same question. (P. 414.)

In *Amy* v. *Supervisors*, *supra*, Mr. Justice Swayne says:

The two sets of tribunls—State and national—are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction for the satisfaction of its judgments and decrees. (11 Wall. 138.)

(d.) In *Rio Grande Railroad Company* v. *Gomila*, (132 U. S. 478), it is said that " the jurisdiction of

a court of the United States once obtained over property by being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State or by any proceedings subsequently commenced in a State court." (P. 481.)

(e.) This question has been decided in accordance with the contention of the plaintiffs in error by the Circuit Court of the United States for the Northern District of New York, with reference to the injunction granted by the judgment in this very action.

See *Central Nat. Bank* v. *Hazard*, 49 Fed. Rep. 293, in which Judge Wallace, in his opinion, uses the following language:

> No Federal court has ever recognized the authority of a State court to enjoin its proceedings or to enjoin parties from proceeding, in a suit in which the Federal court has first acquired the jurisdiction of the controversy and the *res*, but such authority has been uniformly denied by the Federal courts. (Citing the cases above referred to.) (P. 295.)
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> * * * * * * * *

In the present case, after the decree was made by this court ordering the property to be sold by its officer, and the officer had proceeded towards executing the decree by advertising the property for sale, the property was under the dominion of this court as effectually as though it had been seized upon an execution. And it is equally clear that after the sale had taken place under the decree in

the Sackett suit, and the property had been conveyed to Hazard and Foster, the property passed from the dominion which the State court had previously exercised over it. The Stevens suit was an original and independent proceeding, not a supplementary proceeding connected with the Sackett suit. As was said in *Barrow* v. *Hunton*, 99 U. S. 80:

"If the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; * * * a new case arising upon new facts, although having relation to the validity of an actual judgment or decree."

The case, therefore, is one for the application of the rule that the jurisdiction of a court of the United States once obtained over property by its being brought within its custody, continues until the purpose of the suit is accomplished, and cannot be impaired or affected by any proceedings subsequently commenced in a State court. (*Railroad Co.* v. *Gomila*, 132 U. S. 478.) (P. 296.) (See motion papers, pp. 77 to 79, fols. 278 to 284.)

(f.) These decisions of this court that an interference by injunction by the State courts with proceedings in the courts of the United States, will not be tolerated, have recently been repeated and emphasized in the case of *Moran* v. *Sturges*, 154 U. S. 256, reversing the judgment of the New York Court of Appeals in the case, *Matter of the Schuyler Steam Tow Boat Co.*, 136 N. Y. 169. The reason-

ing of this court in that case is entirely inconsistent with the contention of the defendants in error, that the State court has power virtually to annul a decree of the Federal court by enjoining the parties in whose favor it is rendered from taking the proper steps to enforce the decree.

3. The court below had no right to inquire into the merits of the case, which was decided by the Circuit Court of the United States.

The following language of this court used in reference to a judgment of the United States Circuit Court, well states a plain and well-settled proposition in regard to the effect of judgments or decrees of courts of competent jurisdiction:

Their judgment or decree, when rendered, is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity and its effect are complete in all respects between all parties in every suit, and in every form where it is legitimately produced as the foundation of an action, or of a defense, either by plea or proof, as it would be in any other circumstances. While it remains in force, it determines the rights of the parties between themselves and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate. (*Crescent City Live Stock Co.* v. *But-*

chers' Slaughter House Co., 120 U. S. 141, 157, 158. See, also, *Covell* v. *Heyman*, 111 U. S. 176.)

This case should not be confounded with those in which something has arisen since the rendition of the judgment to render its enforcement inequitable, as where the judgment of the Federal court or of a sister State has been reversed upon appeal, or where it has since been paid or collected. (See High on Injunctions, sec. 269.)

The courts below seem to have thought that the rendition of the judgment in this case brings it within the doctrine above stated (see opinions of Judge Barlett, p. 113, fol. 385, and of Mr. Justice Putnam, pp. 69, 70, fols. 255, 256), but the "something" which must arise after the rendition of the judgment, in order to authorize a State court to prohibit its enforcement, must be a reversal or payment or something of that kind. The judgment in this case depends entirely upon facts which existed before the decree in the United States Circuit Court was rendered, and it does not, as the learned justice states, "avoid" the certificates.

See opinion of Mr. Justice Putnam denying motion to strike out the clause in the judgment enjoining appellants from enforcing the judgment by a sale of the premises. (Motion papers, pp. 69, 70, fols. 255, 256; also 69 Hun, 460.)

It certainly does not and could not pronounce void

the agreement by which Foster and Hazard agreed to pay the certificates, which was adjudged by the United States Circuit Court to make them binding upon all the parties to the suit in that court.

Nor should the case be confounded with cases like *Barry* v. *Brune* (71 N. Y. 262), where two parties claimed the same fund, and one brought a suit in the Federal court without making the other a party, in which case a bill of interpleader was brought in this State, in which both parties claimant were made defendants as well as the judgment debtor, the insurance company, and it was held that a judgment might be entered restraining the collection of so much of the judgment in the United States Circuit Court as was held to be payable to the other claimant. This case would be analogous to that if there was some party claiming to own the receiver's certificates other than the complainant and the other parties in the United States Circuit Court. But there is no question here that if anybody was entitled to recover upon the certificates, it was the parties who prevailed in the United States Circuit Court. Neither the complaint nor the proofs in this case show any *facts* arising since the decree of the United States Circuit Court impairing the obligation of the defendants in that suit to pay as therein adjudged.

4. The portions of the decision and judgment re-

ferred to were not at all necessary to give the plaintiffs below the relief to which the court decided that they are entitled.

The defendants in error have never contended, and no court has ever decided, that the receiver's certificates were void, or that they were not a lien upon the premises to the extent that the bondholders who participated in the Sackett suit were represented therein. There can be no doubt that Foster and Hazard, as purchasers under the judgment in the Sackett suit, obtained good title to such interest, as the parties to the Sackett suit had in the premises in question. The plaintiff's original contention was, that that was only to the extent of Marvin Sackett's bonds, amounting to $8,700. It is decided in this case, however, that that interest extended to the bonds owned by plaintiffs who participated and did not hold aloof from the Sackett action. Such was, we understand, the decision of the trial court. It necessarily follows, then, that Foster and Hazard became by their purchase, the equitable, if not the legal, owners of so much of the premises in question as belonged in equity to the bondholders represented in the Sackett suit. If the court below was correct in this, a sale under the decree of the United States Circuit Court could give title to the purchaser there-under only to the extent of such interest. The rights of the purchaser are perhaps subject to the rights of such of the bondholders as

were not repreented in the Sackett suit. (See *Dupasseur* v. *Rochereau*, 21 Wall. 130; *Embry* v. *Palmer*, 107 U. S. 3.)

5. The portions of the decision and judgment above referred to must have been inserted in the interest of the defendants in the United States Circuit Court suit, and not in the interest of the defendants in error who make this motion.

The Lebanon Springs Railroad, for whom Mr. Paige professes to act in making this motion (see p. 11, fol. 4), is not a party to this action, and has no standing in court to make this motion. It has, however, no interest whatever in maintaining the portion of the judgment below, of which we complain. Its title derived from Foster's deed will certainly be no worse because the injunction which forbade the sale to Foster, is reversed and held for naught.

The other persons in whose name Mr. Paige also makes this motion, have no interest whatever in maintaining their rights real, or pretended, as bond holders, in sustaining this part of the judgment. Their rights are fully and entirely protected by other portions of the judgment. In fact, the only parties to the record who are interested in maintaining the validity of this injunctive part of the judgment, are Rowland N. Hazard and William Foster, Jr., who are named in the writ of error as defendants (p. iii, fol. 7), and who do not come to the front, or appear

openly in making this motion. That they, or rather William Foster, Jr., alone (for we understand that Mr. Hazard has since died insolvent), is the real party who is seeking to sustain this interference by the State court with the decree of the United States Circuit Court, is plain from the facts, which are below more fully referred to, appearing in the affidavit of Mr. Bulkeley. (Pp. 99 to 103 of the motion papers.)

If the entire record, including the answer of defendants Foster and Hazard, had been printed and brought before the court on this motion, it would have plainly appeared that they were not in a position to object to the enforcement of the decree of the United States Circuit Court.

THIRD. THE COURT BELOW APPARENTLY OVERLOOKED THE FACT THAT THIS COURT HAS REPEATEDLY HELD THAT AN INJUNCTION RESTRAINING PARTIES FROM AVAILING THEMSELVES OF A DECREE OR JUDGMENT IN THEIR FAVOR IN THE FEDERAL COURTS IS, IN SUBSTANCE AND EFFECT, AN ATTEMPT TO REVERSE OR NULLIFY SUCH JUDGMENT OR DECREE.

Most, if not all, of the cases cited on the argument in the Court of Appeals were cases where the State courts had attempted not directly to enjoin the United States court, but to enjoin the successful

parties in the United States court from availing themselves of their judgment or decree.

Thus in *Riggs* v. *Johnson County* (6 Wall. 166), the injunction granted by the Iowa State court was against the county officers, enjoining them from levying a tax to pay the judgment in the United States court, and this was held to be beyond the powers of the State court.

In *United States* v. *Council of Keokuk* (6 Wall. 514), the injunction by the State court was directed to the defendants, the Common Council of Keokuk, enjoining them from levying a tax to pay the judgment in the United States court. This injunction was held to be inoperative.

In the *Mayor* v. *Lord* (9 Wall. 409), the injunction of the State court was against the mayor and aldermen of the city of Davenport to restrain the said officers from levying a tax to pay certain bonds of the city upon which a creditor had recovered judgment against the city.

In *Supervisors* v. *Durant* (9 Wall. 415), the injunction of the State court was against the supervisors of a county to prevent their levying a tax to pay interest on bonds on which the relator had obtained judgment in the United States court.

So in *Amy* v. *Supervisors* (11 Wall. 136), the injunction of the State court was against the supervisors to restrain them from levying a tax to pay the judgment obtained in the Federal court.

Indeed, it is too plain to require argument, that an injunction granted by a State court, whether by order or judgment, which undertakes to restrain the successful parties in a suit in the Federal court, which has proceeded to judgment or decree, is in substance and effect a reversal and annulment of the judgment or decree itself. Nobody can enforce such judgment or decree, but the party to the suit or action, who has succeeded. If a State court can, by its order or judgment, prohibit him from enforcing the judgment or decree in his favor, it does virtually reverse and annul the judgment of the Unied States court.

It is to be observed, also, that the judgment appealed from not only enjoins the certificate holders from proceeding with the sale under the decree, but undertakes to restrain them " from *suffering said sale to proceed* in their or any of their names or behalf." (Fol. 662.)

The statement, therefore, of the learned counsel for the defendants in erorr, in his brief below, and repeated in his brief here on p. 38, that " there is nothing in the judgment which interferes with the decree or the process of the officers of the United States court," is incorrect. The defendant certificate holders are commanded *not to suffer* the sale to proceed. In other words, they are commanded to prevent the sale, which the United States Circuit Court has commanded the referee to make. By

this judgment, the Supreme Court of the State of New York commands the certificate holder defendants to *prevent* the referee named in the United States Circuit Court decree, who is an officer of that court, from obeying the mandate of the Federal Court, that he shall proceed to sell. How can it be said that this is not an interference with the decree or with any officer of the United States court?

FOURTH. THE COURT BELOW OVERLOOKED THE CIRCUMSTANCE THAT NO *fact* HAS OCCURRED SINCE THE RENDITION OF THE DECREE OF THE UNITED STATES CIRCUIT COURT WHICH MAKES IT INEQUITABLE OR IMPROPER TO ENFORCE THAT DECREE.

We are aware that the Court of Appeals says in its opinion that "the setting aside of the judgment in the Sackett suit, upon which the suit in the United States Circuit Court was founded, for fraud, was *a new fact* occuring since the decree in that court, which gave jurisdiction in this action to enjoin proceedings thereon." (144 N. Y., last sentence of page 49.)

But in saying this, the court overlooked or disregarded the fact that the alleged fraud for which the Sackett suit was set aside was proved by facts which existed and were matters of record long before the decree in the United States Circuit Court

was rendered. Not a fact or a circumstance tending to establish fraud can be found in the voluminous record in this case, which was not a matter of record and accessible to all the parties in the United States Circuit Court case, at the time of the trial of that case. They were matters which could have been pleaded and proved as a defense in that suit. If the certificates were void by reason of fraud, such fraud was apparent upon the record of the Sackett suit, and the defendants in the action brought by the certificate holders could have set up such fraud and proved it as a defense. Having omitted or neglected to do so, it was not for the plaintiffs below in this suit to shield them, by proving it for them, in another and independent action brought to trial long after the decree in the United States court.

The setting aside of the judgment in the Sackett suit by the judgment at bar, was not a *new fact* giving to the State court jurisdiction to vacate or perpetually enjoin the enforcement of the judgment of a Federal court. If so, the well-settled rule that such interference by a State court is inoperative and invalid, is prctically abrogated.

Suppose the suit in the Federal court to have been for the specific performance of a contract, or for any equitable or legal relief founded on a contract. The unsuccessful party in the Federal court, instead of appealing from the judgment of that court,

chooses to bring a new action in a State court, and get a judgment setting aside, or, in the language of the counsel for the respondent, "wiping out" the contract upon which the suit was brought in the Federal court. Is that a new fact? If so, there can never be anything conclusive in a judgment in a court of independent jurisdiction. All that is necessary is for the court of the other jurisdiction to render a judgment on somebody's behalf other than the parties in the court of original jurisdiction, setting aside or "wiping out" the contract, which was the foundation of the first suit, and the judgment or decree of the court which first obtained jurisdiction, may be reversed and annulled, on the pretense of a "new fact" consisting of a provision of the very judgment which is complained of.

Again, it is a mistake to say that the certificates which were the foundation of the suit in which the United States Circuit Court rendered its decree, were annulled and wiped out by the judgment at bar. On the other hand, it is expressly held in this very case, by the courts below, that the certificates were good as to the bondholders, who were actually represented in the Sackett suit, and were binding upon them. There is nothing in the judgment at bar (striking out the injunction of which we complain) which is inconsistent with the fact that Foster and Hazard acquired, by the sale in the Sackett suit, title to an undivided part of the prem-

ises in question, bearing the same proportion to the whole premises as the number of bondholders represented in the Sackett suit bore to the entire number of bondholders, and the receiver's certificates were valid to the same extent.

FIFTH. THE RULE THAT COURTS WILL SET ASIDE AS A NULLITY A JUDGMENT DECREE OR AWARD OBTAINED BY FRAUD (see opinion of Judge Bartlett, motion papers p. 115, fol. 392), HAS NO APPLICATION TO THIS CASE.

There is no allegation or pretense, nor a particle of evidence anywhere in the record, that the decree in the United States Circuit Court, the enforcement of which is enjoined by this judgment, was obtained by fraud. There is on pretense, nor a particle of evidence that the certificates held by the plaintiff in error were not obtained and purchased by them in good faith. On the other hand, the court below found as a fact, that the defendant, The Central National Bank of Boston, became the purchaser for value of receiver's certificates to the amount of $250,000, which the said bank now holds and owns. (36th finding.)

It also finds that since the rendering of the decree, the defendants, who are the plaintiffs in error here, have duly appeared before the master *pro hac vice*

mentioned in the decree of the United States Circuit Court, and produced their certificates, and made proof of their title thereto, and the amount due thereon. (47th finding.)

These findings of fact do not, it is true, appear in those detached portions of the record which the counsel making this motion has seen fit to bring before this court, to the exclusion of the remainder of the record. That they are in the record, however, cannot be questioned.

SIXTH. THE COURT BELOW ENTIRELY MISAPPREHENDED THE EFFECT OF THE DECISION AND DECREE OF THE UNITED STATES CIRCUIT COURT.

1. The opinion of that court is reported, 30 Federal Reporter, 484. The following extract contains the portion of the opinion, which states the ground of the decision:

The defendants do not contest the validity of the certificates, but they claim that the receiver negotiated them collusively with one Crane, so that there was derived from them, for the benefit of the trust fund, a sum considerably less than ought to have been realized; and they insist that, as these certificates are not negotiable paper, the holders can enforce them only for the amount paid for them by the person to whom they were originally transferred by the receiver. The defendants are not in a posi-

tion to litigate such a defense. Receiver's certificates are not commercial paper, and the holder takes them subject to all equities between the original parties, even though he acquires them for value, and without notice; and when they are negotiated at a discount, which the receiver is not authorized to allow, a *bona fide* holder will only be protected to the amount actually advanced by the first purchaser. (*Stanton* v. *Alabama R. Co.*, 2 Woods, 506; *Union Trust Co.* v. *Chicago, &c. R. Co.*, 7 Fed. Rep. 513; *Bank of Montreal* v. *Chicogo R. Co.*, 48 Iowa, 518; *Turner* v. *Peoria R. Co.*, 95 Ill. 134.) But the defendants have no interest in the trust fund represented by the certificates; and it is wholly immaterial to them whether the certificates were or were not negotiated upon fair terms and for the best interests of the fund. The purchasers at the sale under the decree, and every person claiming under such purchasers, are estopped from contesting the validitty of the certificates or questioning the amount for which the certificates were declared to be a lien upon the property purchased. The decree adjudicated the certificates to be a lien to the extent of the principal and interest unpaid upon the entire issue of $350,000. The defendants are privies to that judgment, and are concluded by it, equally with the original parties to the suit. Every person is a privy to a judgment whose succession to the rights of property thereby affected, occurred subsequently to the commencement of the suit. Every grantee is estopped by the judgment against his grantor, because he holds by a derivative title from such grantor. (Freem. Judgm. sec. 162; *Adams* v. *Barnes*, 17 Mass. 367; *Campbell* v. *Hall*,

16 N. Y. 575, 579.) In *Swann* v. *Wright's Ex'rs*, 110 U. S. 590, a decree in a mortgage foreclosure provided that the sale of the mortgaged property should be made subject to the payment of all receiver's certificates which had been established as valid by prior decrees in the suit or by that decree, and it was held that the purchaser at the sale could not contest the lien of certificates, the validiy of which had been established by an interlocutory decree, even upon the ground of concealment and fraud subsequently discovered, by which, as was alleged, the decree had been obtained. Irrespective of the estoppel by the decree, the defendants cannot be heard to assert that the certificates are not a lien for the whole principal and interest due upon them. They are estopped because the deed executed by the referee, which is the source of the title of the defendants, conveyed the property "subject to the payment of the undue principal and interest" on the certificates. (*Horton* v. *Davis*, 26 N. Y. 495; *Freeman* v. *Auld*, 44 N. Y. 50; *Parkinson* v. *Sherman*, 74 N. Y. 88; *Grissler* v. *Powers*, 81 N. Y. 57.) (Pp. 485, 486.)

2. The decision of the trial court in this action was based entirely upon the opinion of the General Term of the New York Supreme Court. (57 Hun, 499, 515.) Mr. Justice Putnam, in his opinion, considers himself as entirely controlled by the opinion in 57 Hun, and quotes largely from it (p. 53). He says, "Whatever my views might be, I must, of course, be guided by the decision of the appellate court." (Fol. 207a.) And again, "Nothing re-

mains for me but to direct judgment in pursuance of the holding of the General Term." (P. 56, fol. 216.)

3. Looking the General Term opinion, we find the following with reference to the decree of the Unied States Circuit Court:

The Central National Bank of Boston, a large holder of these certificates, as plaintiff for itself and all other certificate holders, brought an action against Hazard and Foster, the purchasers of the railroad, upon the sale in the Sackett suit and against the New York, Rutland and Montreal Railway Company, to which company Hazard and Foster conveyed the railroad, and against the American Loan and Trust Company, trustees of mortgage bonds issued by the said railway company. Judgment was obtained against said defendants, establishing the bank's ownership of its certificates and their lien upon tthe railroad, and providing for the sale of the railroad to pay the plaintiff, and such others as should come in and establish their ownership. *Such a judgment is good against the defendants in that action.* They derive title to railroad under the Sackett sale, which preferred the certificates. It is not binding upon the plaintiffs. Whether Hazard and Foster, or their grantees, are entitled to any equity for betterments against the plaintiffs is doubtful; they were bondholders themselves and they acquired, by their purchase, the title of such of the other bondholders as acquiesced in the Sackett suit; they took the risk of its extent, and could

expend as much money in betterments as they chose. They co-operated with other bondholders in making the purchase and in organizing the New York, Rutland and Montreal Railway Company, in order to make it their grantee. This company could only mortgage its own title.

As there must be a new trial, we leave this question to be adjusted as the equities may then appear. There will need to be an idenification of the bond holders who are entitled to come in and share with the plaintiffs in this action. *They are those who held aloof from the Sackett action.* (57 Hun, pp. 514, 515.)

In the line of the above expression of opinion of the General Term, the Court of Appeals says in its opinion:

It must be admitted that the United States Circuit Court had jurisdiction of the subject matter in the suit referred to, and that its decree was proper and binding upon the parties before it.

There is nothing in the judgment at bar that attacks the jurisdiction of the United States Circuit Court or questions the legality of the decree. (144 N. Y., pp. 58, 59; motion papers, pp. 111, 112, fols. 381, 382.)

But the "judgment at bar" prohibits the complainants in that decree from enforcing it by causing or suffering a sale. And the court, subsequently in its opinion, says as follows:

We think it is clear, both upon principle and au-

thority, that this power did exist, and that the sale under the decree of the United States Circuit Court *was without force or effect as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment at bar.* (Pp. 112, 113, fols. 384, 385.)

In other words, the court below seems to hold that although the judgment at bar does not question the legality of the decree of the United States Circuit Court, still its injunction against the execution of that decree was so potent that a sale under the decree, although expressly directed by the United States Circuit Court, having before it "the judgment at bar," was "without force or effect as to the parties in that suit."

This curious judgment which does not "question the legality" of the decree of the Federal court, but enjoins its enforcement, and deprives the complainants therein of all benefit to be derived from it, reminds one of the crafty politician who announced himself as in favor of the prohibitory law, but opposed to its enforcement! It says to the plaintiffs in error "your judgment is valid and right, but is without force or effect so far as it confers any rights or benefits upon you."

SEVENTH. THE COURT BELOW EVIDENTLY MISAPPREHENDED THE GROUND UPON WHICH IT WAS CLAIMED BY THE PLAINTIFF IN ERROR AND WAS HELD

BY JUDGE WALLACE, UPON THE APPLICATION OF ONE OF THE CERTIFICATE HOLDERS FOR AN ORDER COMPELLING THE REFEREE TO PROCEED WITH THE SALE, THAT THE PORTION OF THE JUDGMENT AT BAR WHICH ENJOINS THE CERTIFICATE HOLDERS FROM CAUSING OR SUFFERING A SALE TO TAKE PLACE UNDER THE UNITED STATES CIRCUIT COURT DECREE, WAS UNNECESSARY.

Mr. Paige, in his brief, puts this upon the ground that the counsel for the certificate holders has always claimed that a sale under the United States Circuit Court decree would give perfect title to the premises. It is not important, however, what the counsel for the certificate holders has claimed. The question is, what the "judgment at bar" has held and adjudged.

The court below found as a fact that the Sackett suit was commenced at the request and with the concurrence of holders of Lebanon Springs Railroad Company bonds, amounting to about $1,200,000; that one Edward Crane, who was the owner of said bonds amounting to about $700,000 face value, was also represented in the Sackett suit; that certain other persons representing large amounts of the Lebanon Springs bonds were represented in the Sackett suit. Indeed, these findings appearing in the judgment, on pages 37 and 38 of the motion papers, would show that nearly or quite all the holders of the Lebanon Springs bonds, amounting

to $2,000,000, were represented in the Sackett suit.

It is very likely that some of the $1,200,000 of bonds mentioned in folio 145 are duplicated in the following statement; but the finding would certainly show that much the larger proportion of these bonds were represented in the Sackett suit.

It has always been conceded, and, as has already been seen, was found by the General Term, that the bondholders, who were actually represented in the Sackett suit, were bound by that decree and were, therefore, of course, bound by the subsequent decree in the United States Circuit Court made in the suit brought by the certificate holders.

EIGHTH. NOTHING HAS OCCURRED SINCE THE JUDGMENT WHICH AFFECTS THE RIGHT OF THE PLAINTIFFS IN ERROR TO A REVERSAL OF THAT PART OF THE JUDGMENT COMPLAINED OF.

1. The counsel for the defendants in error (plaintiffs below) noticed a motion in the Court of Appeals to dismiss the appeal and affirm the judgment (motion papers, p. 82), which, by stipulation, was heard at the same time with the appeal. (Id. p. 81.) This motion was based upon certain resolutions purporting to have been passed by the board of directors of the Lebanon Springs Railroad (pp. 82, 83), and a pretended stipulation of said railroad

(pp. 83, 84), a deed from William Foster, Jr., and wife to the Lebanon Springs Railroad, dated June 9, 1893 (pp. 84 to 91), and a deed from Worthingon Frothingham, referee, appointed by the decree of the United States Circuit Court, to William Foster, Jr., dated April 25, 1892 (pp. 92-96), and the confirmation of the report of sale by the United States Circuit Court. (P. 98.) In opposition to this motion, an affidavit was filed made by Alpheus T. Bulkeley, one of the attorneys for the plaintiffs in error (defendants below). (Pp. 99 to 103.) This motion was not passed upon by the Court of Appeals. The statement in the brief of the learned counsel for the defendants in error at page 24, that "the plaintiffs below moved in that court for the affirmance of the judgment (fol. 292), and it was there affirmed," while literally true, is (of course unintentionally) misleading. One would naturally infer from the statement that counsel meant to say that the judgment was affirmed upon that motion. But on examining the judgment of the Court of Appeals (p. 104), it will be seen that the affirmance by the Court of Appeals was upon the appeal from the judgment, and that no reference whatever is made either in it or in the opinion of Judge Bartlett, to the motion.

2. In addition to the papers used upon the motion in the Court of Appeals, the counsel produces

here exemplified copies of what purport to be two orders made in this action more than six months after the record in the action had been brought to this court by writ of error. These orders, both of which were filed on the 23rd day of September, 1895, bear date, one April 22, 1893, and the other September 19th, 1895. (Pp. 124, 126.) The first recites that an application has been made to the court (New York Supreme Court) to punish the defendants in that action named in the order (being plaintiffs in error here) for contempt for their disobedience of that part of the judgment which perpetually enjoined and enjoins them from proceeding with the sale under the decree of the United States Circuit Court, and from suffering the said sale to proceed in the name or behalf of either of them, and recites that it appearing to the court, and the court having found that none of the above-named defendants has in any way disobeyed said injunction nor anything in said judgment, and ordered that the said application be and is denied, and these proceedings dismissed. The other order recites an application to punish the defendant Peter Butler for contempt in disobeying the same injunction, his death, and orders that the application be dismissed. (Pp. 126, 127.)

3. The counsel for the defendants in error states his position with reference to these alleged facts upon his brief, as follows:

They cannot raise the question, because they sold notwithstanding the injunction, got all the benefit of their decree, and have also parted with all their interest in the property, which is now owned by the Lebanon Springs Railroad, defendant in error here in court asking the affirmance of the judgment.

That they cannot raise the question by virtue of being in peril of contempt, because it has been judicially and finally determined that they are not in contempt. (P. 7.)

In answer to these propositions, we say:

I. The deeds referred to in the notice of motion below afford no basis for the dismissal of the writ of error or for affirmance of the judgment.

Of course, the consent and stipulation by the Lebanon Springs Railroad to the dismissal of the appeal amount to nothing, unless that company is now possessed of *all* the rights and interests of the certificate holders. It is possessed of only such rights as were conveyed to Foster by Frothingham, referee. By the decree of the United States Circuit Court he was authorized to sell and convey only the premises described in the complaint, which were the right, title and interest of the Lebanon Springs Railroad Company in and to the real estate and property therein mentioned, being the premises and property described in the bill of complaint. The certificate holders had, under that decree, other rights which the judgment in this case undertakes to deprive them of. This is apparent by examining

the judgment in this case and especially the portions already quoted.

It also provides that the sale shall be made subject to a debt which the receiver has been authorized to contract, to the amount of $20,000, and to no other lien or charge whatsoever (pp. 44, 45, fols. 176, 177), thus entirely ignoring the lien adjudged by the United States Circuit Court decree, in favor of the certificate holders.

It appears, from the affidavit of Mr. Bulkeley in this case, that the defendant, William Foster, Jr., after the rendition of the judgment in this action, brought another action in the Supreme Court of the State against the Central National Bank of Boston and the other defendants, certificate holders, in which the prayer of the complaint was, among other things, that so much of the decree of the Circuit Court of the United States as adjudges or decrees that said William Foster, Jr., either alone or with Rowland N. Hazard, should pay to the said Central National Bank of Boston and to the other of said certificate holders, or either or any of them, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property, should be annulled and the enforcement thereof perpetually enjoined, and that as to so much of the decree of the United States Circuit Court as adjudges that the said Central National Bank of Boston and other certificate holders have execution for the residue

or any part of said indebtedness, the plaintiff is entitled to have the same annulled and the enforcement thereof perpetually enjoined, and praying for a perpetual injunction against the defendants in said action issuing execution under the said decree of the United States Circuit Court, or taking proceedings in the said court or otherwise, for the purpose of enforcing payment or collection of the said certificates or any of them: that, in his complaint in said action, Foster sets forth, among other things, the judgment in this action, and makes the same a part of his complaint; and the complaint of Foster in that action bases his claim for the relief asked, upon the judgment in this action; that the same justice of the Supreme Court who granted the judgment in this action granted an injunction in that action enjoining and restraining the said Central National Bank and other certificate holders from issuing execution upon the decree of the Circuit Court for the purpose of enforcing the payment or collection of any of the said certificates of indebtedness. It appears, also, from said affidavit that the defendants in that action removed the same into the Circuit Court of the United States for the Northern District of New York, and that the same is therein pending, and that the injunction therein granted by Mr. Justice Putnam has been vacated and dissolved. It appears further that in that case the Central National Bank

sets up in its answer and contends that the Supreme Court of the State of New York did not have and has not jurisdiction or power to deprive the defendant and the other certificate holders of the benefit of the decree rendered in the United States Circuit Court, or any of the remedies given to them thereby, and that it is claimed and contended by the counsel for said Foster i said action that the sale of the premises describ n the complaint therein, under the decree of the l ted States Circuit Court, is void, for the reason that the same was made in disobedience of the injunction contained in the judgment in this action, and that one of the grounds on which said Foster, in that action, is seeking to enjoin the certificate holders from issuing execution against him is, that the sale under the United States Circuit Court decree being void for the reason above stated, the Central National Bank and the other certificate holders had, therefore, no right to issue execution against said Foster, said right being dependent upon a legal and valid sale having taken place of the premises described in the bill of complaint, under said decree of the United States Circuit Court. (Motion papers, p. 102, fols. 352, 353.)

There are other circumstances mentioned in the affidavit of Mr. Bulkeley, from which the plaintiffs in error claim that this suit is brought in collusion with the said Foster and for his benefit, and that

this motion and the so-called resolution of the board of directors of the Lebanon Springs Railroad and the stipulation and consent executed pursuant therto by the alleged president of said railroad, were adopted in the interest of said Foster and by collusion with the plaintiffs or the counsel for plaintiffs in this action. (Same, p. 103.)

It is enough, however, to defeat this motion that the judgment at bar, if sustained as a legal and valid judgment, would invalidate the sale made under the United States Circuit Court decree, and would, therefore, deprive the certificate holders of the right to issue execution against Foster and Hazard, which right is dependent upon a *valid* sale under the said decree, upon the principle that an act done in violation of a valid and binding injunction conained in the decree of a court having jurisdiction of the parties and the subject matter, is void.

If the plaintiffs in error do not succeed in reversing that portion of the judgment in this action which enjoins them from selling the premises in question, or from enforcing the lien of their certificates, they may be absolutely deprived of their personal remedy against Foster and Hazard given them by the decree of the United States Circuit Court.

II. There are other interests of the plaintiffs in error which are affected by the judgment here, as

to which they have a right to be heard upon writ of error.

(a.) The referee is directed to pay to the certificate holders from the proceeds of sale herein, so much " as shall satisfy the same, as the same shall be found by the report of the referee." (Fol. 667.) The referee is, by the judgment, authorized also to determine " from the aforesaid evidence and findings and such other evidence as shall be furnished him, who are the holders of receiver's certificates and how much has been paid upon them " (fol. 675), and the holders are required to produce their certificates before the referee (fol. 676), and to " make proof as to their title thereto and the amount due thereon." (Fol. 677.)

These portions of the judgment are excepted to. The judgment provides in effect that the referee shall review the finding of the United States Circuit Court, which has established the rights of the certificate holders and passed upon their title, and that their right to share in the proceeds of any sale that may be made under the judgment in this action shall depend upon the finding by the referee as to the title to the certificates and the amount due thereon.

In other words, the right of the certificate holders to enforce the decree of the United States Circuit Court by a sale of the premises and execution

against Foster and Hazard, the defendants, in the United States Circuit Court action, is taken away by this judgment, if it be sustained. The title of the certificate holders to their certificates, which has been adjudicated in their favor by the United States Circuit Court, is also made by the judgment to depend upon the finding of the referee, who is to decide as to such title, not only from the evidence and findings of the court in this action, but from such other evidence as shall be furnished him.

It is clear that the plaintiffs in error have a substantial right which is not affected by the sale under the decree in the United States Circuit Court, or the deed given to Foster by the referee named therein, to have their writ of error from the judgment in this action heard and determined by this court.

III. The copies of orders made by the New York Supreme Court in this case, after the record had been brought to this court by writ of error, do not show that the plaintiffs in error are not still in danger of punishment for contempt if the injunction contained in this judgment be sustained.

The proceedings in which these orders were made, are not brought before this court. They could not well be, as they are no part of the record. It does not appear who applied to punish them for con-

tempt, though it may be inferred from the appearances recited, that it was the plaintiffs below.

But there are two kinds of contempt recognized in the New York practice. One is a criminal contempt, which may consist of a wilful disobedience of a lawful mandate of the court. (N. Y. Code of civil Procedure, sec. 8.) Another is a contempt by which a party is injured, which is punished on the application of a party injured for the purpose of indemnifying the party so injured. (N. Y. Code of Civil Procedre, sec. 14.) There is nothing to show under which of these sections the application was made. If it was made by a party claiming to have been damaged, for compensation or indemnity, the order would be no bar to a proceeding for criminal contempt. If it was a proceeding to punish for a criminal contempt, it would be no bar to an application made by a party for compensation for damage resulting from such contempt.

Inasmuch as the plaintiffs in error, while they did not affirmatively cause the sale to proceed under the United States Circuit Court decree, still did *suffer* it to proceed, and did nothing to *prevent* a sale by the referee under that decree, it is difficult to see how they could escape liability if the injunction were valid, for a violation of the command that they should not *suffer* a sale to take place.

The defendants in error have not shown therefore that the plaintiffs in error are free and dis-

charged from liability for punishment for contempt in the State court.

IV. But fear of punishmnt for contempt is not the motive which has induced the plaintiffs in error to bring this judgment before this court. They are parties to this action, and appeared therein. The courts of the State of New York acquired jurisdiction of their persons. If the judgment enjoining and prohibiting the sale stands as a valid judgment, affirmed by the Court of Appeals and by this court, or if the writ of error should be dismissed, it would be claimed by the defendant in error Foster, in his suit now pending, that there had been no valid sale, and that no execution could therefore be issued against him to enforce his personal liability for a deficiency. Indeed, he makes such claim now, and upon his claim, Mr. Justice Putnam of the New York Supreme Court granted a preliminary injunction enjoining the plaintiff in error from issuing execution to collect the deficiency against him.

We are aware that the learned counsel for the defendants in error, protests in his brief here that "the sale was not void, it was good." (Brief, p. 26); also p. 27, "The sale in question was not even in violation of the injunction." But the Court of Appeals held otherwise.

Let us try the "deadly parallel:"

MR. PAIGE'S BRIEF.	COURT OF APPEALS OPINION.
But the sale was not void. *It was good.* (P. 26, last line but one.) * * * But the sale in question *was not even in violation of the injunction.* (P. 27, beginning of second paragraph.)	We think it is clear, both upon principle and authority, * * * that the sale under the decree of the United States Circuit Court was *without force or effect* as to the parties in that suit, *as they proceeded in violation of the injunction contained in the judgment at bar.* (Pp. 112, 113, fols. 384, 385.)

Defendant in error Foster may therefore successfully contend if this court shall allow the injunction against the enforcement of the United States Circuit Court decree against him to stand, that it has been finally adjudged by the Court of Appeals, in an action to which the certificate holders and he were both parties, that the sale under the decree was wthout force or effect as to him and them, and that therefore, there having been no valid sale, the certificate holders should be enjoined from issuing execution against him for the deficiency in the suit which he has brought and which is now pending.

FINALLY. The counsel for the defendants in

error has caused to be printed and presented to the Court on this motion, but a small fraction of the record, hardly one-fifth thereof. Many very important matters bearing upon the question of the jurisdiction of the court and the interest of the plaintiffs in error are omitted — among others, all the pleadings in this action, and all the findings of the trial court made under the New York practice pursuant to requests or proposed findings made by the defendants below. He has also printed and presents to the court many papers, not contained in the record, which are not properly here, and ought not to be considered by this court, and which, as been has pointed out above, are incomplete and imperfect.

But enough facts appear, even from this hotchpotch of papers, to show that the motion should be denied; that there are Federal questions involved, upon which the judgment of this court should be taken, and that the plaintiffs in error have a vital interest in maintaining their position in regard to those Federal questions.

The plaintiffs in error have no reason for delay and do not desire it. They are anxious to meet the questions involved in this writ of error upon the merits. They hereby offer to join with the defendants in error in an application to the court to advance the cause, and that it be heard as soon as

the record, which is very voluminous, can be printed.

It is evident upon the principles laid down in 108 U. S. 5, that this motion cannot be granted without the court having the entire record before it. It should be denied with costs.

All of which is respectfully submitted.

Dated January 6, 1896.

MATTHEW HALE,
HENRY D. HYDE,
Attorneys and of Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

NUMBER 568.

THE CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

against

AARON R. STEVENS, IDA S. HARRISON, THE LEBANON SPRINGS RAILROAD, and others,
Defendants in Error.

ON MOTION TO ADVANCE.

The undersigned, counsel for the plaintiffs in error in the above entitled case, make no objection to the advancing of said case, if it shall seem to the Court that there are good grounds for doing so, but would beg to suggest if the Court decides to advance the same that some day next autumn be assigned for it to be heard, as the record is very voluminous, and it will be very difficult for the clerk to print the same and deliver it to counsel in time to prepare suitable briefs therefrom, prior to the Spring adjournment.

MATTHEW HALE,
HENRY D. HYDE,
Counsel for Plaintiffs in Error.

CONTENTS.

	PAGES.
Statement of prayer of complaint in this case	2, 3
Statement as to answer of certificate holders	3, 4
Statement of motions to dismiss complaint	5–7
Brief introductory statement	9–12
More detailed statement of facts	13–27
Adjudicating part of judgment at bar	28–31
Assignment of errors	35–38
General contention of plaintiffs in error	39
History of suit in which the U. S. Circuit Court decree was rendered	39–53
U. S. Circuit Court Decree	48–53
Brief history of this suit	53–59
Particulars in which the judgment of the New York court fails to give due effect to the decree of the U. S. Circuit Court	59–63
Authorities as to want of power of State courts to enjoin enforcement of U. S. Circuit Court decree, First Point	64–65
Review of cases showing that this rule cannot be evaded by pretense of acting in personam on the parties, Second Point	65–68
That judgment below cannot be sustained on ground that courts will set aside a judgment or decree obtained by fraud, Third Point	68–80
That judgment at bar cannot be sustained as a decree founded on bill of review, Fourth Point	80–83

PAGES.

That no fact has occurred since the rendition of the decree which makes it inequitable or improper to enforce it, Fifth Point 83–88

That it was error in court below to review adjudication of U. S. Circuit Court as to title of plaintiffs in error to certificates, Sixth Point..... 88–89

Error in refusal to find that the receiver's certificates were as against all parties a first lien on the railroad premises as adjudged by the U. S. Circuit Court, Seventh Point 89–116

Statement as to paragraph 26 of complaint..... 93

Eighth Point; error in refusal to find 116

Ninth Point; nothing has occurred since the judgment which affects the right or interest of plaintiffs in error to reversal..... 118

Tenth Point; stating what portions of the judgment should be reversed..... 119–120

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 248.

THE CENTRAL NATIONAL BANK OF BOSTON and others (holders of Certificates issued by John W. Van Valkenburgh, as Receiver of the Lebanon Springs Railroad Company), Plaintiffs in Error,

against

AARON R. STEVENS and others, Defendants in Error.

Brief of Plaintiffs in Error.

This case comes before this court on writ of error to the Court of Appeals of the State of New York, which rendered a judgment affirming a judgment rendered by the Supreme Court of the State of New York in favor of Aaron R. Stevens and others, plaintiffs below, defendants in error here.

The action was originally brought in the Supreme Court of the State of New York in the name of Aaron R. Stevens as sole plaintiff. Other parties were brought in as co-plaintiffs with him, as appears by the fifth amended complaint to be found on

pages 3 to 23 of the printed record. The plaintiffs below in whose favor judgment was rendered were the defendants in error, Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the last will and testament of William Henry Douglas, deceased, and Ida S. Harrison. These plaintiffs were or claimed to be holders of bonds issued by the Lebanon Springs Railroad Company, and some of them also holders of bonds issued by the Harlem Extenson Railroad Company, which was a successor of the Lebanon Springs Railroad Company. The prayer of the complaint may be found on page 23 of the printed record. It is in substance (1) that it may be adjudged that the owners of all the bonds issued by the Lebanon Springs Railroad Company have a first lien on the railroad and its property, and the owners of the bonds issued by the Harlem Extension Railroad Company, a second lien thereon, and that the bonds and mortgage executed by the defendants Hull and Lincoln to the defendant Duncan and Trenor W. Park is held for the benefit of the owners of the said bonds, and represents their interest solely, and that defendants Brown and Seligman redeliver the same; (2) that the judgment in the foreclosure suits, referred to more particularly hereafter, be specifically enforced, and the mortgage made by Hull and Lincoln be foreclosed and the railroad and property be sold under

said judgments and decrees, and the mortgage of Hull and Lincoln for the benefit of the plaintiff and all other of the owners of the Lebanon Springs and Harlem Extension bonds, and that all the defendants be barred and foreclosed, etc.; (3) that it may be adjudged that the certificates issued by Receiver Van Valkenburgh were beyond the power of the court to issue, and are of no validity except to bind the interest represented by the eight bonds of Marvin Sackett and the interests of the defendants in the action brought by said Sackett; (4) that all the defendants in this action and all other persons be enjoined from interfering with any part of the railroad or property; (5) for the appointment of a receiver; (6) for general relief.

The plaintiffs in error, The Central National Bank of Boston, interposed an answer to be found on pages 24 to 30 of the printed record. It was subsequently stipulated that this answer should be considered as the answer of the other certificate holders who were defendants in the action, as if they had united therein, and that it be deemed amended so far as to set up the claims of the said other certificate holders to the certificates owned by them, and in all other respects that are necessary in order to make the said answer applicable to the case of the said other certificate holders. (See page 86.) It was also stipulated and admitted that at the time the answer of the Central National Bank

of Boston was interposed, the 26th paragraph of the complaint did not contain the allegation as to the intention of Marvin Sackett in bringing his suit, which appears at the top of page 22 of the printed record, and that the admission in the answer of the certificate holders in the 12th subdivision of the first paragraph of the answer, near the end of page 25, should be considered as admitting only that portion of the 26th paragraph of the complaint, ending with the words "allowances of the suit" at the bottom of page 21, and that the remaining part of paragraph 26 should be deemed as controverted under the second paragraph of the answer. (See stipulation on page 85.) This answer sets up the decree of the Circuit Court of the United States hereinafter referred to (see fourth paragraph, p. 29 of record), and annexes a copy of the same thereto as a part thereof. (See schedule C, pp. 34 to 37.)

The judgment of the New York Supreme Court, which was affirmed by the Court of Appeals and which is brought by writ of error before this court, may be found on pages 87 to 119 of the printed record. This judgment recites the findings of fact and conclusions of law found by the court, and among other things, provides that the defendants, The Central National Bank of Boston and other certificate holders named therein, and all other owners of certificates issued by Van Valkenburgh, receiver, and each of them, and their and each of

their officers, agents, servants and attorneys are perpetually enjoined and restrained from proceeding with the sale under the decree in the action brought by the defendant, The Central National Bank of Boston, against the defendants, Hazard, Foster and others, a copy of which is attached to the answer of the Central National Bank in this action, and from suffering the said sale to proceed in their or any of their names or behalf. (Printed record, p. 113, original, 188, 189.) It also provides that all owners of any of the certificates issued by Van Valkenburgh, receiver, are perpetually enjoined and restrained from bringing or proceeding with any action or proceeding in any court whatever, to enforce any lien upon or for the sale of or to affect any of the property franchises and powers hereinafter described, or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or to be proceeded with in the names of any of them. (Printed record, p. 113, original, 188.)

The proceedings in the suit in which this decree was passed, including the making of the decree and the proof of title to the certificates by the certificate holders, were found by the court below in pursuance of the 46th and 47th requests of the plaintiffs in error, on page 503 of the record.

At the close of the evidence on the part of the plaintiffs below, counsel for the certificate holders

moved to dismiss the complaint, first for the reason that the plaintiffs had failed to show such relation to the subject matter, and to the bonds which they claimed to own, as enitled them to the interposition of the court in their behalf; second, that the plaintiff had proved that there was a foreclosure and sale under the decree in the suit brought by the trustee under this Lebanon Springs Railroad mortgage, a conveyance of the property to the purchaser, and the execution of liens by the purchaser, and transfer to a new party; assuming that to be so, then there was no such thing as a bondholder of the Lebanon Springs Railroad under the Union Trust Company mortgage in existence, and there is no such mortgage in existence; that there was a judgment and sale under the order of the court to the purchaser, so there was no mortgage to be enforced.

The motion was also made on the ground that it appeared by the evidence already in that in a decree in a suit in which the bondholders of the Lebanon Springs Railroad Company were represented by Marvin Sackett, the validity of the certificates had been established, and the certificates had been adjudged to be a lien upon this property to the extent of the entire amount unpaid at the time of the decree, and there being no evidence that the bonds presented here as belonging to the plaintiff Stevens were not represented in that suit, the presumption is that they were actually in fact repre-

sented by Marvin Sackett in that suit, and that the legal presumption is that they were so represented. (See printed record, pp. 432, 433.)

A similar motion was made on behalf of the defendants Foster and Hazard. These motions were denied and exceptions taken.

The additional ground was taken by the counsel for the certificate holders that plaintiff had made no proof showing that he had any equity or that he had any standing in court to maintain a suit in the nature of a bill in equity, and therefore his complaint should be dismissed. (Record, p. 433.)

The defendants also each moved to dismiss the complaint upon the additional ground that the complaint charged that the action of Sackett against Root was a collusive action brought and maintained by the plaintiff in that action for his own benefit and in fraud of the rights of the bondholders, and that there is no evidence offered by the plaintiff showing or tending to show any such fraud or collusion on the part of the plaintiff or any one connected with the matter. This motion was also denied and each one of the defendants duly excepted. (Record, p. 433.)

The decree of the United States Circuit Court in the case of the Central National Bank of Boston against Foster, Hazard and others, being the same as annexed to the answer of the Central National Bank, was given in evidence by the certificate holders. (See record, p. 448.)

It was admitted on the trial that under the decree in the action of the Central National Bank of Boston against Foster, Hazard and others, the property that had been formerly of the Lebanon Springs Railroad Company, was advertised for sale on the 19th day of May, 1889; that the property described in the complaint in this action has since been advertised and is still advertised for sale under that decree; that the Central National Bank of Boston and the other certificate holders received the back interest on their certificates out of the $155,000 consideration paid by Foster and Hazard under the judgment in the Sackett suit, and that the payments of interest made up to January 1, 1891, were made by the defendant William Foster, Jr.; also that defendant Foster has paid on account of principal of the certificates held by the Central National Bank of Boston, Peter Butler, as receiver of the Pacific National Bank, and the Massachusetts Mutual Life Insurance Company, the sum of $65,000. (Record, pp. 462, 463.)

The referee's deed dated August 29, 1885, between George McClellan, referee in the Sackett suit, of the first part, and William Foster, Jr., and Rowland N. Hazard of the second part, reciting the judgment in the Sackett suit and the sale of the premises described in said judgment for the sum of $155,000 to the parties of the second part, and the confirmation of the referee's report of sale, and

conveying to the said parties the property and franchises described in the judgment in the Sackett suit, was put in evidence by the counsel for the certificate holders. (See record, pp. 467, 468.)

It was also stipulated in writing that the pleadings in the suit of the Central National Bank of Boston against Rowland N. Hazard and others, brought in the New York Supreme Court and transferred to the United States Circuit Court, and also the report of the special master in said suit, dated February 7, 1888, be considered as in evidence the same as if they had been offered on the trial by the certificate holder defendants, subject to any objections to be specified that might then have been made thereto. (Record, p. 468.)

The pleadings and proceedings, including the report of the master *pro hac vice*, in the Central National Bank suit, may be found pages 469 to 490 of the record.

BRIEF INTRODUCTORY STATEMENT.

The controversy here is between holders of receiver's certificates, who claim a lien upon the Lebanon Springs Railroad under an order of the New York Supreme Court and a decree of the Circuit Court of the United States for the Northern District of New York, on the one hand, and bondholders of the Lebanon Springs Railroad, claiming a

lien upon the same property under a judgment of the New York Supreme Court, on the other.

The case is this:

In 1880 one John W. Van Valkenburgh was appointed receiver of the property of the Lebanon Springs Railroad Company in New York by the New York Supreme Court, in a suit brought by one Sackett claiming to be a holder of the bonds of the Lebanon Springs Railroad and suing in behalf of all the bondholders. In 1881 the receiver was authorized and directed by order of the court to issue receiver's certificates to an amount of $350,000, dated April, 1881, and payable in 5 years with interest at the rate of 6 per cent., and it was provided that the certificates should be a first lien upon the railroad and its property. (See order, pp. 30, 31 & 32 of record.) The receiver did issue and negotiate these certificates and the Central National Bank became the owner for value of $250,000 of such certificates.

In 1884 the Sackett suit was brought to trial and judgment rendered therein in January, 1885, adjudging the receiver's certificates to be a valid and first lien upon the property and directing a sale of the property for the benefit of the bondholders, but that such sale should be made subject to the payment of the undue principal and interest of the certificates and the expenses of the suit.

A sale was made by the referee on the 12th of

June, 1885, to William Foster, Jr., trustee, for the sum of $155,000, which sum was just sufficient to pay the expenses of the suit, fees of the receiver, etc., and the interest on the receiver's certificates.

After the sale, one William V. Reynolds, who had succeeded Van Valkenburgh as receiver, brought suit in the New York Supreme Court against the Central National Bank to have the certificates declared void and demanding judgment that such certificates were of no force and validity, and that the same be delivered up to the plaintiff, as receiver, to be cancelled, but the court directed the receiver to discontinue his suit against the bank, and judgment was thereupon rendered in favor of the said bank against the said Reynolds, as receiver. (See 49th finding, p. 502.)

The principal of the certificates became due in April, 1886, and was not paid, whereupon the Central National Bank brought an action in the New York Supreme Court against Foster and his grantees to have the certificates established as a first lien upon the property and for a sale of the property to satisfy the certificates and a judgment for any deficiency against the defendants. This suit was removed to the United States Circuit Court on petition of the defendants, and that court, in 1887, rendered its decree, adjudging the certificates to be a first lien upon the property and directing a sale to satisfy the principal and unpaid interest of the

certificates, and decreeing that Foster and the other defendants pay to the certificate holders any deficiency.

After this decree and before any sale had been had pursuant to it, one Stevens, claiming to be a holder of a bond of the Lebanon Springs Railroad Company, brought a suit in the New York Supreme Court to have the judgment in the Sackett suit declared null and void and set asde and to have it adjudged that the receiver's certificates issued in that suit were beyond the power of the court to issue.

This Stevens' case was tried twice in the New York Supreme Court, and in December, 1891, judgment was entered vacating, reversing and setting aside the judgment in the Sackett suit and all orders and proceedings therein, and restraining all owners of certificates from bringing any action or suffering any to brought in any court to enforce the lien upon or for the sale of the property, and enjoining the Central National Bank and the other certificate holders from proceeding with the sale under the decree of the Circuit Court of the United States, or suffering the same to proceed and directing a sale of the property for the benefit of the bondholders of the Lebanon Springs Railroad Company.

It is these provisions of the judgment of the State court preventing the certificate holders from availing themselves of their decree in the Federal Court and depriving them of the benefit thereof, in which it is claimed there is error to be corrected here.

MORE DETAILED STATEMENT OF FACTS.

Without undertaking to state all the matters of fact which are found by the court below, counsel for the plaintiffs in error submit the following as substanitally all which are thought to bear upon the questions which are brought by the writ of error before this court:

The Lebanon Springs Railroad Company was organized in the year 1852. By virtue of various acts of the legislatures of Vermont and New York, it became vested with all the powers, franchises, rights and privileges of a railroad corporation of the State of New York and became possessed and the owners of certain real and personal property described in the decision and judgment. (Printed record, pages 88 to 92.)

On the first day of July, 1867, it duly issued and sold to a great number of parties its bonds of the denomination of $1,000 each, to the amount of $2,000,000, bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal to become due in thirty years from date. (Pages 92, 295, 492.)

To secure these bonds it executed and delivered to the Union Trust Company of New York its mortgage upon all its property, rights, powers and franchises. (Pages 92, 492.)

Default was made in the payment of interest upon

these bonds, and by reason of a condition in the bonds and the mortgage, the whole principal sum secured by the mortgage became due on the first day of January, 1870. (Sixth finding, p. 492.)

In January, 1870, the Lebanon Springs Railroad Company consolidated its road, franchises and property with the road, franchises and property of the Bennington and Rutland Railroad Company, and one company was thereby formed of said two companies under the name of the Harlem Extension Railroad Company. (Pages 93, 94.) This company also executed bonds to the amount of $4,000,000, of which only $1,500,000 were issued, secured by mortgage to the Union Trust Co. on the same property. (P. 94.)

No interest was paid upon said bonds, either by the Lebanon Springs Railroad Company or the Harlem Extension Railroal Company after January 1, 1870. (Ninth finding, p. 493.)

The Union Trust Company commenced an action to foreclose the said first mortgage February 22, 1872, making the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company, William Butler Duncan and James B. Hodgkins defendants in the action, in which judgment of foreclosure and sale was duly rendered December 10, 1872 (see copy judgment, pp. 96 to 98), and under said judgment all the powers, rights and franchises therein described were sold January 25, 1873, by

Charles S. Fairchild, referee, and were bid off by William Butler Duncan for the sum of $100,000. (Tenth finding, p. 493.)

On the same day, by the direction of Duncan and without the knowledge or consent of the bondholders, the premises so bid off by him were conveyed by said referee to James C. Hull, the clerk of Duncan, who was not present at the sale, by a deed of conveyance, which was duly recorded in the clerk's offices of the counties of Rensselaer and Columbia. (Eleventh finding, same page.)

No part of said purchase price of $100,000 was ever paid by Duncan or Hull or any other person, and no money or other valuable thing was paid on account of said sale, except that the plaintiff's taxable costs and the referee's fees on foreclosure were paid by some person. (Twelfth finding, same page.)

About the same time the Union Trust Company commenced an action, in the State of Vermont, against Harlem Extension Railroad Company and the Lebanon Springs Railroad Company to foreclose said mortgage, which action proceeded to decree of sale December 6, 1872. (See copy decree, pp. 98 to 100.) One Daniel McEowen was appointed a special master in chancery to make such sale, and he sold the property of said companies within the State of Vermont to Trenor W. Park for the sum of $25,000, and by direction of

Park the said special master executed and delivered a deed of said property to one Charles G. Lincoln, which was duly recorded in Vermont. No part of said $25,000 was ever paid by Park or Lincoln or any other person. (Thirteenth finding, pages 493, 494.)

Neither the plaintiff nor any of the bondholders of the Lebanon Springs Railroad Company, except, perhaps, William Butler Duncan and Trenor W. Park, had any knowledge or information of the said conveyances to Hull and Lincoln, or of the non-compliance with the terms and conditions of the sale, and the non-payment of the purchase money, or of any of the subsequent acts or transactions with respect to the property, until about the time of the commencement of an action in the New York Supreme Court, in which Marvin Sackett was plaintiff, and Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and Daniel Butterfield, as receiver of the last named company, were defendants, which action was commenced in the year 1880. (Fourteenth finding, p. 494.) This action will be hereafter for convenience referred to as "the Sackett suit."

January 30, 1873, Hull and his wife conveyed the premises which had been conveyed to him by Fairchild, referee, to the New York, Boston and Montreal Railroad Company for the nominal consideration

of five dollars, which deed was duly recorded in Rensselaer and Columbia counties. (Sixteenth finding, p. 494.)

Afterwards, Lincoln conveyed the premises, rights and franchises conveyed to him by the special master in Vermont to the same company for a like nominal consideration, and his deed was duly recorded in Bennington county, Vermont. (Seventeenth finding, pp. 494, 495.)

Afterwards, the New York, Boston and Montreal Railroad Company became, and is, utterly insolvent, and Daniel Butterfield was duly appointed by this court receiver of all and singular its property, rights and franchises. (Eighteenth finding, p. 495.)

Neither the New York, Boston and Montreal Railroad Company nor the said Butterfield ever took possession or used or occupied the said Lebanon Springs Railroad or any of its franchises, or claimed to exercise any control over the same, or to possess any right thereto in connection therewith, and never paid any sum or sums whatever as a consideration of the said pretended transfer; but, on the contrary, they abandoned the same, and although said receiver was made a party defendant in the Sackett suit, he made no claim to any right or property therein, and judgment by default was entered as against said receiver. (Nineteenth finding, same page.)

From about the time of the insolvency and the

appointment of a receiver of the New York, Bosto and Montreal Railway Company, and after its abandonment by the said company and its receiver, down to the commencement of the Sackett suit, the said road, its property and franchises had been used and occupied by persons having no right or authority so to do. The last two occupants were the said Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company, which were defendants in the Sackett suit. Neither of said last named parties ever had or claimed to have any authority or right to use or occupy the said railroad, or its property, derived from any person or persons having the right to grant such authority. (Twentieth finding, same page.)

The Sackett suit was commenced at the request and with the concurrence of holders of Lebanon Springs Railroad Company bonds, owning bonds amounting to about $1,200,000 at their face value, and counsel retained, acting for such bondholders to the amount of about $1,200,000, drew the original complaint in said action, at the request and with the concurrence of said bondholders, including Sackett. (Twenty-second finding, pp. 495, 496.)

During the pendency of the Sackett suit, certain persons claiming to hold, and actually holding, a majority of the bonds of the Lebanon Springs Railroad Company applied by petition to the court to be made parties to said action, either as co-

plaintiffs or as co-defendants. This petition was presented to the court at Special Term, and a motion made that the prayer of said petition be granted, but the court denied the motion, the justice before whom the motion was made making a memorandum of his decision, stating that the plaintiff should not be embarrassed by having united with him on the record parties whose case he might not be able to sustain, but that these parties should have notice of every step in the case, so they might protect their interests, and that an order should be made requiring all papers and notices to be served upon Mr. F. L. Westbrook, and allowing him, as counsel, to appear on trials, hearings and motions.

This memorandum was dated December 28, 1880. (Twenty-third finding, p. 496.)

Thereupon the attorney of the petitioners drew an order in pursuance of said decision, which was duly filed and entered, and by which it was ordered that the plaintiff's attorneys should serve copies of all papers and notices of every kind upon F. L. Westbrook, of Kingston, and he was authorized and allowed to appear as counsel in behalf of the petitioning bondholders. (See twenty-fourth finding, pp. 496, 497.)

Frederick L. Westbrook, who was named in said order, was a counselor-at-law and had been employed as counsel for said petitioning bondholders, and had appeared for them upon the presentation

of the petition and upon the argument of the motion; and upon the argument of the motion it was understood and agreed, between the attorney for said petitioners, Lyman B. Bunnell, and said Frederick L. Westbrook, that the latter should be the person designated in said order upon whom such notices should be served. (Twenty-fifth finding, p. 497.)

One Edward Crane, during the pendency of the Sackett suit, was the owner of bonds issued by the Lebanon Springs Railroad Company amounting to between $500,000 and $700,000 face value, and while the owner of such bonds was consulted in regard to said suit, and was represented in the Sackett suit by the attorney and counsel who conducted the suit in the name of said Sackett. (Twenty-seventh finding, p. 497.)

None of said petitioners appealed from the order denying the motion to make them parties. (Twenty-ninth finding, p. 498.)

In the Sackett suit, John W. Van Valkenburgh was, on the 1st day of October, 1880, appointed receiver of the Lebanon Springs Railroad Company, its property and franchises, and, in or about November, 1880, qualified and entered upon the discharge of his duties as such receiver. (Thirtieth finding, p. 498. See order appointing receiver, pp. 206 to 209; certificate of filing security, pp. 209, 210.)

Said Van Valkenburgh, soon after his appointment in the Sackett suit, took possession of the

railroad and property of the Lebanon Springs Railroad Company, and continued in the possession thereof; and continued in possession and to operate said railroad as such receiver until his resignation and the appointment of his successor. (Thirty-third finding, p. 499.)

Upon his appointment, the receiver found that there was no rolling stock or means of operating the road, or making necessary repairs, and thereupon, to relieve the immediate pressing necessity, the court ordered the issue of $25,000 par value of receiver's certificates, and afterwards, upon the further representations of the receiver of the condition of the road and its wants, an engineer expert was appointed by the court to examine into the condition of the road. Upon that report being presented, it appearing that a larger sum of money was necessary to preserve and protect the property and keep it running, the court ordered the issue of $350,000 face value certificates, $25,000 to be used to repay the first $25,000, and the other $325,000 to be used for the necessary wants of the road and its preservation. The order so made was the same as Exhibit A, annexed to the answer of the Central National Bank, and was dated April 2, 1881. (See order, pp. 31, 32; thirty-fourth finding, pp. 499, 500.)

Certificates of indebtedness, amouting in the aggregate to $350,000, were issued and negotiated by

the receiver pursuant to said order. These certificates were in the form of Exhibit B annexed to the answer of the Central National Bank. (See pp. 33, 34; thirty-fifth finding, p. 500.)

The Central National Bank became the purchaser for value of said receiver's certificates to the amount of $250,000, which it still holds and owns. (Thirty-sixth finding, p. 500.)

The receiver, after his appointment, made diligent inquiry to ascertain the names and residences of the holders of the Lebanon Springs Railroad bonds, and notified, by letter, such bondholders as he could ascertain of his appointment as receiver. (Thirty-seventh finding, same page.)

The Sackett suit was brought to trial at a Sepcial Term of the court. After said trial, the court filed its decision, dated December 13, 1884, by which it found substantially the facts stated in the findings found at the request of the plaintiffs in error, from the first to the nineteenth, inclusive, except the seventeenth finding of fact, and also found, as conclusion of law, that the purchase by Duncan was for the benefit of the bondholders of the Lebanon Springs Railroad Company, and vested the right to a title in them; that the conveyance by the referee to Hull, in accordance with the directions of Duncan, merely vested the title in Hull as trustee for the bondholders; that the conveyance by Hull and wife to the New York, Boston and Montreal Rail-

way Company was wholly ineffectual to pass any title to said company, or to divest the bondholders of any title therein, and that the title to, and beneficial interest in, the railway company, its rights and franchises, was continued to be, and still was, in the bondholders of the Lebanon Springs Railroad Company, and that the property and franchises and powers of said company, as described in the mortgage to the Union Trust Company, and all of the right, title and interest of any and of all the parties to the action be sold at public auction, and that all parties be barred and foreclosed of all right, title and interest in said property; that a referee be appointed to make such sale, and that, in the decree or judgment to be entered in the action, such clause or clauses should be inserted therein as, in the judgment of the court, might be necessary to protect holders of receiver's certificates. Judgment in said action was rendered January 12, 1885, and filed in the Rensselaer county clerk's office. A copy of the judgment is annexed to the answer of defendants, Royal E. Robbins and others, marked "Exhibit A," except that the judgment contained a full description of the mortgaged premises described in the complaint in this action. (See Exhibit "A," pp. 51 to 53; thirty-eighth finding, pp. 500, 501.)

There is no evidence in the case that Stevens, the original plaintiff, nor any or either of the other

plaintiffs brought in during the progress of this action, or their predecessors, owners of the bonds presented in this action by the plaintiffs, were not represented by counsel in the Sackett suit, or that they, or either of them, did not have full notice and knowledge of all the proceedings in the Sackett suit. (Forty-third finding, p. 502.)

June 25, 1883, William V. Reynolds was appointed as receiver of the Lebanon Springs Railroad Company, in place of Van Valkenburgh. After the sale under the judgment in the Sackett suit, Reynolds, as receiver, brought an action against the defendant, the Central National Bank of Boston, claiming and alleging that the said bank was not the holder and owner of the said certificates amounting to $250,000, but had wrongfully obtained possession of the same, and alleging that said certificates and the coupons annexed thereto were wholly void, and had no force or validity against the receiver and the bondholders whom he represented, and demanding judgment accordingly; but afterwards, upon the motion of the defendant, an order was made directing and requiring said Reynolds, as receiver, to discontinue said action, and on the 28th day of November, 1885, judgment was rendered in said action in favor of the defendant, the Central National Bank, against said Reynolds, as receiver. (Forty-fourth finding, p. 502.)

Under the judgment in the Sackett suit, the rail-

road and property of the Lebanon Springs Railroad Company was sold to the defendants Foster and Hazard for $155,000, which was paid by them, and the usual referee's deed of the said railroad and property was made and delivered to them, and they were put in possession of said railroad and property and remained so in possession until they delivered possession of the same to the defendant, the New York, Rutland and Montreal Railway Company, and, by orders of the court, the said receivership was terminated and the receiver discharged. (See allegation in the complaint, paragraph 25, p. 21, admitted by the answer of plaintiffs in error, par. 12, page 25.)

Out of the said sum of $155,000, the purchase price of said premises, paid by Hazard and Foster, the interest due and unpaid upon the receiver's certificates held by the Central National Bank, the Massachusetts Mutual Life Insurance Company, and the receiver of the property of the Pacific National Bank, was paid and the balance of the purchase money was used and applied as directed by the judgment in the Sackett suit. (Forty-fifth finding, pp. 502, 503.)

When the principal of said certificates became due, April 1, 1886, it was not paid, and thereupon the defendant, the Central National Bank of Boston, brought an action in the New York Supreme Court in behalf of itself, as well as other holders of re-

ceiver's certificates similarly situated, against Hazard and Foster, the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company, as defendants. The defendants all answered. After issue was joined, the action was removed by the defendants therein into the Circuit Court of the United States for the Northern District of New York. After such removal, testimony was taken in behalf of all the parties, and the suit was finally brought to a hearing, and a decision and decree were made therein, of which a copy is annexed to the answer of the defendant, the Central National Bank, marked C. (See pp. 34 to 37.) In pursuance of the said decree of the United States Circuit Court, the referee named therein advertised the property for sale, being the same premises described in the complaint in this action. (Forty-sixth finding, p. 503.)

Since the rendering of said decree in the United States Circuit Court, the defendants named as certificate holders in this action (plaintiffs in error) have duly appeared before the master *pro hac vice*, appointed by the decree, and produced their certificates, and made proof of their title thereto and the amount due thereon. (Forty-seventh finding, p. 503.)

The defendant, James C. Hull, paid no consideration for the conveyance made to him by Charles S. Fairchild, referee, in the foreclosure suit. (Forty-eighth finding, same page.)

No consideration was paid by the defendant, Lincoln, for the deed executed to him in the Vermont suit. (Forty-ninth finding, same page.)

The mortgage executed by Hull and wife and Lincoln to Duncan and Park, purporting to be to secure the payment of $5,000,000, was entirely without consideration as between the parties thereto, and there was at the time of the execution of said mortgage no indebtedness whatever existing from the said mortgagors to Duncan and Park, the mortgagees therein named. (Fiftieth finding, pages 503, 504.)

The sale under the judgment in the Sackett suit was made on the 12th day of June, 1885. At that sale the said premises, franchises and property were fairly struck off to William Foster, Jr., trustee, for $155,000. (Fifty-second finding, p. 504.)

The amount of this bid was paid and the usual referee's deed given. (Complaint, par. 25, p. 21; answer of certificate holders, par. 12, p. 25.)

Most of the above facts were found in pursuance of requests made by the counsel for the plaintiffs in error. Other facts, to which the attention of the court will hereafter be called, were also found in the decision above referred to. Upon the facts above mentioned and the others found in the decision, the judgment of the New York Supreme Court, which was affirmed by the Court of Appeals and is now before this court for review, was rendered.

The adjudicating part of this judgment so far as material to the argument of the writ of error is as follows:

It is now, on motion of Campbell and Paige, attorneys for the plaintiffs, adjudged,

. . . . . .

That all owners of any of the certificates hereinbefore described as issued by the receiver, Van Valkenburgh, and each of them, and their and each of their officers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers hereinafter described, or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or to be proceeded with in the names of any of them.

That the judgment in the action above mentioned brought in this court by the defendant, Marvin Sackett, against Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and Daniel Butterfield, its receiver, entered in Rensselaer county and dated January 12, 1885, and all orders and proceedings in that action, and the sale by the referee under such judgment, and the deed of the referee under such judgment and pursuant to such sale to the defendants Foster and Hazard, be and they hereby are reviewed and in all things reversed, vacated, set aside and held for nothing.

That the defendants, The Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Ester K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company and the American Loan and Trust Company, and all other owners of certificates issued by the said Van Valkenburgh, as receiver as aforesaid, and each of them and their and each of their officers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from proceeding with the sale under the decree in the action brought by the defendant, The Central National Bank of Boston against the defendants, Hazard, Foster, The New York, Boston and Montreal Railway Company and the American Loan and Trust Company, a copy of which is attached to the answer of the Central National Bank in this action, and from suffering the said sale to proceed in their or any of their names, or behalf.

That the judgment and decrees of 1872 be now enforced.

That all the premises, property, franchises and powers hereinafter described be sold together and not separately at public auction in the county of Rensselaer by or under the direction of John L. Henning, of Saratoga Springs, counselor-at-law, who is hereby appointed as referee for that purpose; that the said referee give public notice of the time and place of such sale according to law and the

practice of this court; that either or any of the parties to this action may purchase at such sale; that the referee execute to the purchaser or purchasers a deed of the property, premises, franchises and powers sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses upon such sale and any lien or liens upon the same for taxes, he pay to the plaintiffs or their attorneys the sum of eighteen hundred and seventy-five dollars hereby adjudged to the plaintiffs for their costs, together with the sum of two thousand dollars allowed to the plaintiffs by the court for an additional allowance.

. . . . . .

That the referee, after the payment of the amount of his fees and expenses and the taxes and costs and allowances as aforesaid, shall pay to the holders of the Lebanon Springs bonds the amount found to be due upon their respective bonds, as it shall be established by the report of such referee confirmed by the court, except that as to the proportions coming to the owners of such bonds as were in the Sackett suit, as the same shall be found by such report as confirmed, he shall pay so much thereof to the holders of the receiver's certificates as shall satisfy the same as the same shall be found by the said report so confirmed, and the balance to the holders of such bonds.

. . . . . .

The aforesaid shall be made subject to a debt which the receiver has been authorized to contract to the amount of twenty thousand dollars, and to no other lien or charge whatever.

. . . . . .

That the said referee also ascertain, determine and report, from the aforesaid evidence and findings and such other evidence as shall be furnished him, who are the holders of the said certificates issued by the receiver, Van Valkenburgh, and how much has been paid upon said certificates, and the said referee is hereby authorized and directed to give notice by advertising in two daily newspapers published, one in the city of Troy called the Troy Press, and one in the city of New York called the New York Tribune, requiring the said holders of said bonds and said certificates to produce the same before the said referee at his office in Saratoga Springs, or such other place, and at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto and the amount due thereon.

This judgment was affirmed by the General Term and by the Court of Appeals on appeal. It appears by the record that a motion was made in the Court of Appeals which was stipulated to be heard with the appeal, on behalf of the plaintiffs, and of Edward Winslow Paige, as attorney for the L. S. R. Co., for the dismissal of the appeal to that court, and the affirmance of the judgment (p. 519), such motion being based upon a resolution purporting to be passed by the board of directors of the Lebanon Springs Railroad Company, and upon a deed to William Foster, Jr., executed by the referee mentioned in the decree in the U. S. Circuit Court suit,

dated April 25, 1892, and a deed from William Foster, Jr., and his wife to the Lebanon Springs Railroad, dated June 9, 1893, which recites a deed made to said Foster by the referee appointed by the judgment of the Supreme Court of New York in this action, dated May 16, 1892, and another deed made to him by the New York, Boston & Montreal Railway Company, dated May 17, 1892, and another deed made to said Foster by Willam Butler Duncan and John G. McCullough, as administrator, &c., of Trenor W. Park, deceased, dated May 17, 1892, as well as the deed above referred to made by Worthington Frothingham, referee, to said Foster, dated April 25, 1892. (See pp. 520-527.) Upon this motion, an affidavit was filed by Alpheus T. Bulkeley, one of the attorneys for the appellants in the Court of Appeals (plaintiffs in error here), from which it appears that after the rendition of the judgment in this action, William Foster, Jr., one of the defendants herein, brought another action in the New York Supreme Court against the Central National Bank of Boston and other defendants, in which the complaint prayed, among other things, that as to so much of the decree of the Circuit Court of the United States, dated March 24, 1887, as orders, adjudges or decrees that the said William Foster, Jr., either alone or with Rowland N. Hazard, pay to the said Central National Bank of Boston and the other certificate holders, the residue

of the indebtedness on said certificates remaining unsatisfied after the sale of the property, plaintiff may have the same annulled and the enforcement thereof perpetually enjoined and that so much of the decree as adjudges that the Central National Bank of Boston and the other certificate holders have execution for the residue or any part of such indebtedness, the plaintiff asks to have the same annulled and the enforcement thereof perpetually enjoined, and that defendants (plaintiffs in error here) and each of them, their attorneys, counsel, &c., be perpetually enjoined and restrained from issuing any execution against the plaintiff or his property; that the complaint of the said William Foster, Jr., plaintiff in said action, sets forth among, other things, the judgment in this action, and that Mr. Justice Putnam of the New York Supreme Court had granted a temporary injunction, enjoining and restraining the said Central National Bank of Boston and the other certificate holders firm issuing execution under the said decree of the Circuit Court of the United States, for the purpose of enforcing payment or collection of any of said certificates; that said action brought by said Foster had been duly removed on the petition of the Central National Bank of Boston into the Circuit Court of the United States for the Northern District of New York, and that since such removal, the said Circuit Court has vacated the injunction therein granted

by Mr. Justice Putnam, and the said action is now pending and undetermined in the Circuit Court of the United States; that in said action wherein said Willam Foster, Jr., is plaintiff, now pending in the said U. S. Circuit Court, the said Central National Bank of Boston has set up and claimed that the Supreme Court of the State of New York has no jurisdiction to deprive the said bank and the other certificate holders in that suit of the benefit of the decree rendered in their favor by the Circuit Court of the United States, but that it is contended and claimed by the counsel for the said Foster in said suit that the sale of the premises described in the complaint is void for the reason that the same was made in disobedience to the said injunction contained in the judgment in this action, and that one of the grounds upon which the said William Foster, Jr., is seeking in said action to perpetually enjoin said Central National Bank of Boston and the other certificate holders from issuing execution against him, is that the sale of said premises is void for the reason above stated, and therefore the said Central National Bank of Boston had no right to issue execution against said Foster, said right under said decree depending upon a legal and valid sale having taken place of the premises described in the bill of complaint. The said suit in which William Foster, Jr., is plaintiff is now pending in the Circuit Court of the United States for the Northern District of

New York. (See Mr. Bulkeley's affidavit, pp. 528 to 530 of the record.)

It does not appear that this motion was ever decided by the Court of Appeals. The affirmance of the judgment above referred to by said Court of Appeals was made upon the argument of the appeal from the judgment and without reference to the motion. (See statement as to judgment of Court of Appeals, transcript, p. 530 print, original 845.)

ASSIGNMENT OF ERRORS.

The following are the errors assigned by the plaintiffs in error which will be insisted on upon this argument:

1. That the court below erred in that it did not give due validity and effect to the said decree of the Circuit Court of the United States in and for the Northern District of New York, dated the 24th day of March, 1887, in which the said The Central National Bank of Boston, which sued as well for itself as for all others similarly situated, was complainant, and Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company of New York, were defendants, a copy of which decree is annexed to and made a part of the answer of the said The Central National Bank of Boston in this action.

2. That the said court also erred in perpetually

enjoining and restraining the said plaintiffs in error (defendants in said action) from proceeding with the sale under the said decree of the Circuit Court of the United States above referred to.

3. That the said court also erred in enjoining and restranining all owners of any of the certificates described in said judgment as issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, and each of them, and their and each of their officers, agents, servants and attorneys, from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers in said judgment described, or any interest therein, and from suffering any such action or proceeding to be brought, or to be prosecuted, or to be proceeded with in the names of any of them.

4. The said court also erred in requiring the referee named in the said judgment to ascertain and report from the evidence taken upon the trial in said action, and the findings of the court, and such other evidence as might be furnished him, who, other than the plaintiffs in said action, are the holders of the bonds issued by the Lebanon Springs Railroad Company and The Harlem Extension Railroad Company, and which of them were represented in the trial of the suit brought by Marvin Sackett, referred to in said judgment.

5. The said court also erred in providing in the said judgment that the said referee therein named, ascertain, determine and report from the evidence and findings, and such evidence as might be furnished him, who are the holders of the certificates

issued by the said receiver, Van Valkenburgh, and how much has been paid upon said certificates, such facts having been found, ascertained and determined by the said Circuit Court of the United States in and under the decree of the said Circuit Court of the United States, above referred to.

6. The court below also erred in that by its judgment it required the holders of the said certificates, including the plaintiffs in error, to produce their certificates before the said referee at his office in Saratoga Springs, or at such other place and at such time as he might designate, and make proof as to their title thereto and the amount due thereon; whereas the said facts as to the title to said certificates and as to the amount due thereon, had been conclusively ascertained in and pursuant to the said decree of the Circuit Court of the United States above referred to.

7. The court below also erred in refusing to find as requested by the said plaintiffs in error, that the receiver's certificates issued by John W. Van Valkenburgh, as receiver, and held by the defendants, The Central National Bank of Boston, Peter Butler, as receiver of the property of The Pacific National Bank of Boston, The Massachusetts Mutual Life Insurance Company and the other persons who have appeared before the master *pro hac vice*, and produced their certificates, are as against all the parties to the action, and all the holders of the said bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the said railroad and premises described in the complaint as adjudged by the Circuit Court of the United States by its decree in the suit of The

Central National Bank of Boston v. Rowland N. Hazard and others, as said certificates have been proved before William Lansing, Esq., the master *pro hac vice* named in said decree, and as reported by said master.

8. The court also erred in refusing to find as requested by the said plaintiffs in error, that if any sale be made under the judgment in said action, such sale should be subject to the rights of the defendant, The Central National Bank of Boston, and the other defendants, holders of receiver's certificates (being the plaintiffs in error herein), and that said certificates should be paid to said certificate holders first out of the proceeds of any sale that might be had therein.

And that the said Court of Appeals should have reversed so much of the judgment of the Supreme Court of the State of New York, as in any way impairs the rights of the plaintiffs in error or any or either of them under the said decree of the said Circuit Court of the United States, or in any way enjoins, restrains or prevents the plaintiffs in error, or any or either of them, from enforcing the said decree of the said Circuit Court of the United States, or from having and enjoying the full benefit thereof; but that the said Court of Appeals in fact decided the contrary, to the claims and contentions of the plaintiffs in error in the premises, and in all things affirmed the said judgment of the Supreme Court of the State of New York. (See assignment of errors, record, pp. 543 to 546.)

GENERAL CONTENTION OF PLAINTIFFS IN ERROR.

THE COURT OF APPEALS OF THE STATE OF NEW YORK, AS WELL AS THE SUPREME COURT OF THAT STATE, FAILED TO GIVE DUE EFFECT TO THE DECREE OF THE CIRCUIT COURT OF THE UNITED STATES IN FAVOR OF THE PLAINTIFFS IN ERROR.

The above proposition states the general ground upon which the writ of error in this case has been applied for and issued. Before discussing in detail the different points arising under this general proposition, it will perhaps be profitable to state concisely, (1) the history of the suit in which the decree of the United States Circuit Court was obtained, and (2) to point out the manner in which the judgment of the State court undertakes to interfere with and destroy the rights of plaintiffs in error under the said decree of the United States Court.

History of the suit in which the United States Circuit Court decree was rendered.

This suit was brought in the Supreme Court of the State of New York by the plaintiff in error, The Central National Bank of Boston, as plaintiff, suing as well on behalf of itself as all others similarly situated. The complaint of the plaintiff in that

suit may be found on pages 469 to 474 of the record. The defendants in that suit were Rowland N. Hazard, William Foster, Jr., The New York, Rutland & Montreal Railway Company and the American Loan & Trust Company. The complaint alleges in substance that the plaintiff is a banking association duly organized and incorporated under the laws of the United States, located and doing business in the city of Boston, in the commonwealth of Massachusetts. It alleges the making of an order on or about April 2nd, 1881, by the New York Supreme Court in the Sackett suit, whereby one John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, was authorized and directed to issue under his hand, receiver's certificates of indebtedness, dated April 2nd, 1881, with interest at six per cent. of $500 each payable in five years, interest payable January 1 and July 1 in each year, to the aggregate amount of $350,000, such certificates and the interest coupons thereto attached made payable at the Farmer's Loan & Trust Company in the city of New York, and whereby it was further ordered that the receiver negotiate said certificates to the amount aforesaid, and with the moneys arising thereupon pay and discharge certain previous certificates theretofore authorized by an order of the same court, and from the moneys arising from said certificates, that said receiver purchase all necessary materials for

the repairs of said railroad, and to pay and discharge all necessary expenses incident to the repairs thereof, and all other expenses attending the running and successful managing and operating of said railroad, together with such indebtedness as might be found due to claimants by the referee named in said order; that it was further provided in said order that the said receiver's certificates of indebtedness to the amount therein directed to be issued, be and the same were thereby declared to be a debt of the said receiver incurred for the benefit and protection of the said Lebanon Springs Railroad and its owners and bondholders, and said certificates to the amount of $350,000 were by said order declared to be a first lien on the railroad and all and every kind of property owned by said railroad company or in the possession of the receiver thereof, and that said certificates were to be recognized as such in any re-organization of the company, and that in case of any sale of the railroad, the property in the hands of the receiver, and franchises under any decree of the Supreme Court, said certificates were to be first paid from the first moneys realized therefrom by said receiver, unless sooner paid and cancelled by him from the earnings of said railroad. It was further provided in said order that in case said railroad property in the hands of the receiver and franchises on any sale thereof, should not bring sufficient to pay the full amount

of principal and interest then due on the outstanding negotiated certificates in said order authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver, and franchises, should assume, as a first lien thereon, so much of said principal as at that time should remain outstanding and unpaid with interest thereon, referring to the original order or the record thereof.

The complaint further alleges that the said Van Valkenburgh, as receiver, under and in pursuance of said order, did issue and negotiate such certificates of indebtedness in the manner and form by said order provided to the amount of $350,000, and that he duly applied the moneys received from said certificates to the uses and purposes mentioned and in said order authorized; that the plaintiff is now and has for several years last past been the owner and holder of said certificates amounting in the aggregate to $250,000 of principal thereof, and that the certificates issued and negotiated by the receiver which are not held by plaintiff, are held by divers persons and corporations, many of whose names are unknown to the plaintiff.

The complaint further alleges that in the said Sackett suit, the plaintiff appeared by its attorneys on the trial of the issues and made proof in regard to the issuing of said certificates and its title thereto and that such proceedings were had therein, that a judgment was rendered on or about January

12, 1885, by which it was, among other things, adjudged and decreed that the said certificates, amounting in the aggregate to $350,000, were ratified and confirmed and declared to be a first lien on the railroad and its property, as provided in the said order, for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in said judgment provided for, and whereby it was further adjudged and decreed that the property, franchises and rights of the said railroad company as described in a certain mortgage therein referred to, and in the judgment in said Sackett suit, and all the right, title and interest of any and of all the parties to the said action, including all property and assets in the hands of said receiver be sold at public auction under the direction of a referee therein named for the benefit of the first mortgage bondholders of said railroad company issued July 1, 1867, for the amount of $2,000,000, and that said sale be made subject to the payment of the undue principal and interest of the said receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and should assume as part of the consideration of the purchase, the payment thereof, and from the avails of said sale, after the payment of certain expenses therein provided

for, the said referee should pay the amount of interest due on said receiver's certificates; that under and in pursuance of said judgment, the referee named therein did advertise for sale on the 12th day of June, 1885, and did sell at public auction the premises, rights, franchises and property in said judgment mentioned and described, to the defendants, William Foster, Jr., and Rowland N. Hazard, who became the purchasers thereof for the price of $155,000, and that the said William Foster, Jr., acting on behalf of himself and said Hazard, did pay the referee five per cent. of the purchase price and did subscribe a certain contract of sale, which was also subscribed by said referee, whereby, among other things, he did for himself and said Hazard, assume and agree to pay the amount of unpaid principal and interest on said certificates of indebtedness as part of the consideration of such purchase; that the balance of said $155,000 was thereafter paid by the purchasers to the referee, and that the referee did thereafter duly execute and deliver to the defendants, Foster and Hazard, a deed of said premises and property in said judgment described, and paid from the said $155,000 the interest then due on said certificates, amounting to about $60,000.

Plaintiff further alleged in said complaint that said referee's deed was duly accepted by the defendants, Foster and Hazard, and that in and by

the deed, the grantees therein, the defendants, Hazard and Foster, took said premises and property subject to the unpaid principal and interest on the receiver's certificates, as required by the judgment aforesaid; that the principal of said certificates with interest from January 1, 1886, became due and payable on the 2nd day of April, 1886, and that on that day the said certificates, amounting to $250,000 held by the plaintiff, were duly presented to the Farmer's Loan & Trust Company of the city of New York, where the same were payable and payment thereof was demanded, but the same was refused, and that the whole of said principal with interest from the 1st day of January 1886, is now due and unpaid. The complaint then gives a description of the railroad premises mentioned in the judgment in the Sackett suit and in the referee's deed; alleges that the defendants or some one of them are now in possession of the paoperty above described, and are using and operating the same for railroad purposes, and that all the defendants have or claim to have some interest in or lien upon said premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said certificates, and that there is now justly due the plaintiff upon said certificates held by it, the sum of $250,000 with interest from January 1, 1886.

The complaint then prays that the unpaid principal and interest of said receiver's certificates may

be adjudged to be a lien upon said premises; asks for the usual judgment of foreclosure, for a receiver and for a sale, and that out of the moneys arising from the sale of said premises, plaintiff and other holders of said certificates who may come in and prove their title thereto and the amount due thereon, may be paid the amount due on said certificates with interest and costs, so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants, Hazard and Foster, may be adjudged to pay any deficiency that may remain after applying said moneys so applicable thereto, and for general relief.

The defendants all appeared and answered. Hazard and Foster answered separately by their attorneys Vanderpoel, Green & Cuming, admitting their purchase susbtantially as alleged in the complaint, controverting some of the other allegations and setting up as a distinct defence that they acquired the property mentioned in the plaintiff's complaint with notice that the receiver's certificates were outstanding and of the sum justly due therefor, and that they have ever since been and now are ready and willing to pay the sum justly due on account of said receiver's certificates, but that they are advised and believe that the plaintiff is not entitled to receive payment thereof; that when the said property came into the hands of these defendants, it was subject to a lien for the amount actually due from the receiver and his successor in the

trust for the amount of said receiver's certificates, but for no other or greater amount; and that these defendants when they acquired the property succeeded to all the rights of the prior owners of the property as well as to their obligations; that in accepting the deed of the premises, they intended only to obligate themselves to pay the amount actually due the receiver on account of such certificates, with proper interest, and no other or greater sum by way of profit, and defendants aver that they incurred no greater or other obligations in the premises. (See their answer, pp. 474-476.)

The defendant, The New York, Rutland & Montreal Railway Company, also put in a separate answer by its attorney, Robert Ludlow Fowler (pp. 476-480). It alleged, among other things, that defendants, Foster and Hazard, had conveyed and transferred to it all the property and franchises conveyed to them by the referee in the Sackett suit subject to the payment of the sum justly due by said receiver, but not subject to any greater sum, and it controverts the allegations as to the amounts due on the receiver's certificates.

The American Loan & Trust Company, by Blair & Rudd, its attorneys, also answered separately, setting up that it was the holder of a mortgage executed to it by the New York, Rutland & Montreal Railway Company, and denying knowledge

or information as to the matters charged in the complaint.

This suit was afterwards duly removed on the petition of the defendants, all joining in the petition, into the Circuit Court of the United States for the Northern District of New York. (See petition, pp. 482-485.)

The case came on for a hearing on pleadings and proofs, and after full arugment, a decree was passed, of which the following is a copy (omitting the description which is the same as that contained in the complaint in this action):

> At a Special Term of the Circuit Court of the United States, in Equity sitting, held in and for the Northern District of New York, at the Chambers of the Circuit Judge in the city of Syracuse, on the 24th day of March, 1887.

Present: Hon. William J. Wallace, Circuit Judge.

The Central National Bank of Boston, which sues as well for itself as for all others similarly situated,

vs.

Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York.

This cause came on to be heard at this term, and was argued by Messrs. Henry D. Hyde and Matthew

Hale, of counsel for complainant, and by Messrs. Robert Ludlow Fowler and Thomas G. Shearman, of counsel for defendants, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed as follows:

That the certificates of indebtedness issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2nd day of April, 1881, made in an action in said Supreme Court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described in the bill of complaint herein, in the hands of the defendants herein, and of any persons claiming through or under the defendants, Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said Supreme Court on or about the 12th day of January, 1885; and that the complainant, The Central National Bank of Boston, is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000 of principal thereof, upon which there is now due and unpaid to the complainant the said sum of $250,000, with interest at the rate of six per cent. per annum thereon from the 1st day of January, 1886.

That it be referred to William Lansing, Esq., of the city of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain and report who are the holders other than

the complainant of said certificates of indebtedness, and how much remains due and unpaid thereon. And the said master is hereby authorized and directed to give notice by advertising in two daily newspapers published in the city of Albany in said District, requiring the holdesr of said certificates to produce the same before the said master at his office in the city of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain and report what would be the just proportion and amount for the said other holders of said certificates to contribute to the expenses of this suit.

That the premises and property described in the bill of complaint in this cause, as hereinafter set forth, or such part thereof as is sufficient to satisfy the amount due and unpaid on said certificates, and expenses of sale and the costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the county of Rensselaer, in said District, by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a referee for said purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that the complainant or any other party to this suit may become a purchaser on such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale,

after deducting the amount of his fees and expenses on such sale, the said referee pay to the complainant or its solicitors the amount of its costs and disbursements to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid, together with the interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other said certificates respectively the amount of principal and interest due thereon, as the same may be found and reported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said referee pay and distribute the said moneys, after the payment of the fees, expenses, costs and disbursements above mentioned, to the said certificate holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate holders respectively; that the said referee bring the surplus moneys arising from the said sale, if any there shall be, into court within twenty days after the same be received, to be there subject to the order of the court; that the said referee make a report of such sale, and file the same with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate holders the amount due to them respectively, as may be ascertained by said master as aforesaid, the said referee specify the amount of

such deficiency in his report of sale, and that the defendants, Rowland N. Hazard and William Foster, Jr., pay to the complainant, and to the other of said certificate holders, the residue of the indebtedness on said certificates remaining usatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate holders, to be ascertained as aforesaid, have execution therefor; and that the purchaser or purchasers at such sale be let into possession on the production of the said referee's deed and a certified copy of the order or decree confirming the said referee's report of sale.

And it is further ordered, adjudged and decreed, that the defendants and all persons claiming under them or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said premises so sold or any part thereof. The following is a description of the premises and property hereinbefore referred to and thereby directed to be sold, as contained in a certain mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the deed executed by George McClellan, referee, to the defendants, William Foster, Jr., and Rowland N. Hazard, referred to in the bill of complaint herein: (Description.)

Leave is hereby reserved to the complainant and to the other certificate holders above referred to, or any of them, to apply upon the foot of this decree for the appointment of a receiver to take

immediate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by receivers in such cases. WM. J. WALLACE.

NOTE.—We will hereafter in this brief, for the sake of convenience and brevity, refer to the decree of the U. S. Circuit Court in the suit wherein the Central National Bank of Boston was complainant, as the "Decree;" to the judgment of the New York Supreme Court, affirmed by the New York Court of Appeals and brought for review before this court by the writ of error in this case, as the "Judgment"

Afterwards William Lansing, Esq., the master *pro hac vice* appointed in and by the decree to examine, ascertain and report who are the holders other than the complainant of the said receiver's certificates, made his report, to be found on pages 486 to 490 of the record, from which it appears that the plaintiffs in error were such certificate holders.

Afterwards and before the commencement of this action, Worthington Frothingham, the referee named in the decree, duly advertised the premises for sale under and in pursuance of said decree.

Brief History of this suit.

The action now before this court was originally brought in the name of Aaron R. Stevens, as sole

plaintiff, on or about October 10, 1887. Other plaintiffs were afterwards brought in and the complaint amended. The complaint appearing in the record is the *fifth* amended complaint. (P. 3.) Upon the first trial of the action, before the Special Term of the New York Supreme Court, judgment was rendered against the plaintiffs below dismissing the complaint upon the merits, but that judgment on appeal was reversed by the General Term and a new trial ordered.

See Opinion Stevens v. Central National Bank et al., 57 Hun, 498.

The case was then tried again at another Special Term of the Supreme Court, before Mr. Justice Putnam without a jury, and the judgment was rendered which was affirmed by the Court of Appeals, and is now brought before this court by writ of error. That judgment bears date the 10th day of November, 1891. (P. 86.)

The complaint in this action alleges, among other things, the bringing of the action by the Central National Bank of Boston and its removal into the Circuit Court of the United States and the passing of a decree in that court, whereby it is provided that the said railroad and property be sold by a master of that court for the payment of the said certificates. (P. 22, sub. 28.) It contains no other allegation with reference to that action or the decree

therein. It makes no prayer with reference to the decree in that action, or the enforcement thereof, except that it asks that it may be adjudged that the certificates issued by Van Valkenburgh, as receiver, were beyond the power of the court to issue, and are of no validity except to bind the interest represented by the eight bonds of the said Marvin Sackett, and the interest of the defendants in the action brought by said Sackett, and that all of the defendants in this action and all other persons be enjoined as well temporarily by order as permanently by judgment, from interfering with any part of the said railroad property. (P. 23.)

The decision in this action, among its conclusions of law, contains the provision "that the holders of the certificates issued by the receiver, Van Valkenburgh, are entitled to such proceeds of the sale as shall belong to those Lebanon Springs bonds which were in the trial and judgment in the said suit by Marvin Sackett, represented by counsel actually retained by their owners." It also directs judgment, among other things, (1) perpetualy enjoining all suits to enforce any lien upon or to affect any of said property or franchises, or any interest therein by any of the holders of certificates issued by the receiver, Van Valkenburgh, their agents, attorneys and servants, and (2) adjudging in the usual form of a decree upon a bill of review, that the judgment and all proceedings in the Sackett

suit, including the sale thereunder, and the referee's deed, be now reviewed and reversed, and perpetually enjoining the sale in the suit by the Central National Bank of Boston. (Pp. 111, 112.)

The judgment in terms perpetually enjoins and restrains all owners of any of the receiver's certificates from bringing and from proceeding with any action or proceeding in any court whatever to enforce any lien upon or for the sale of or to affect any of the premises, property, franchises and powers therein described or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or *to be proceeded* with in the names of any of them, and also perpetually enjoining and restraining the plaintiffs in error naming them and all other owners of receiver's certificates, from proceeding with the sale under the decree in the action brought by the defendant, the Central National Bank of Boston against the defendants, Hazard, Foster, The New York, Boston & Montreal Railway Company and the American Loan & Trust Company, a copy of which is attached to the answer of the Central National Bank in this action, *and from suffering the said sale to proceed in their or any of their names or behalf.* (P. 113.)

The judgment also appoints a referee and requires the referee to ascertain, determine and report from the evidence to be taken before him, and

the findings *and such other evidence as shall be furnished him*, who are the holders of said certificates issued by the receiver, Van Valkenburgh, and how much has been paid upon such certificates, and authorizes and directs the referee to give notice by advertising in two papers named, requiring said certificate holders to produce the same before the referee at his office in Saratoga Springs, or such other places as he shall designate, and make proof as to their title thereto and the amount due thereon. (P. 115.)

At the time this judgment was rendered in this suit, the referee appointed by the decree of the Circuit Court of the United States was still advertising the premises for sale under that decree. Application was made on behalf of Peter Butler, as receiver of the Pacific National Bank, the holder of some of the receiver's certificates, to the Circuit Court of the United States for an order requiring the referee named in the decree of the Circuit Court of the United States, to proceed with the sale notwithstanding the injunction contained in the judgment of the New York Supreme Court. This motion was granted by Judge Wallace, rendering a decision and sustaining it by an opinion which is reported 49 Fed. Rep. 293.

Afterwards, as appears by the record of the papers introduced by the defendants in error in the Court of Appeals on their motion to dismiss or affirm, the

premises were sold March 23, 1892, by the referee appointed by the United States Circuit Court decree, and William Foster, Jr., became the purchaser thereof for the sum of $7,500 and received a referee's deed thereof. (See deed, pp. 525-527.)

It appears also that the defendant Foster purchased under the judgment of the New York Supreme Court in this action, and received a deed from the referee dated May 16, 1892. (P. 524.)

It appears also that since the execution of the said referee's deeds to said Foster, the said Foster has brought an action in the Supreme Court of the State of New York against the plaintiffs in error in this action, in which all the proceedings in both the actions are set up and alleged, and wherein he prays for an injunction to restrain the plaintiffs in error, the Central National Bank and the other certificate holders, who are defendants in that suit, from issuing any execution against him to enforce his personal liability under the decree of the Circuit Court of the United States, which suit has been removed into and is now pending in the Circuit Court of the United States in and for the Northern District of New York. (See record, pp. 528 & 529.)

As the case stands now, therefore, the defendant, William Foster, Jr., or his grantees, are the owners of the railroad premises, holding under sales made under and in pursuance both of the decree and the judgment.

Having thus obtained unquestionable title to the premises in question, he is seeking in the Circuit Court of the united States for the Northern District of New York, through the same counsel who represents the defendants in error here, to escape the personal liability to pay the receiver's certificates which was adjudged against him in and by the decree of the Circuit Court of the United States. In that suit he relies upon the judgment now before this court for review as establishing his right to nullify the decree of the Federal Court.

Particulars in which the judgment of the Courts of the State of New York fails to give due effect to the decree of the U. S. Circuit Court.

1. The decree adjudges that the Central National Bank of Boston is the holder and owner of receiver's certificates amounting in the aggregate to $250,000 principal, upon which there is now due and unpaid to the complainant the said sum of $250,000 with interest from January 1, 1886.

The judgment authorizes the referee named therein to ascertain, determine and report from the evidence and findings *and such other evidence as shall be furnished him,* who are the holders of the said receiver's certificates, how much has been paid thereon, and directs him to give notice by advertising requiring the certificate holders to produce the same before him at his office, in Saratoga Springs,

or at such other place and at such other times as he shall designate, and make proof as to their title thereto and the amount due thereon. (See transcript of record, p. 115 print, 191, 192 original.)

The effect of this is to ignore the decree of the United States Circuit Court, which establishes the title of the Central National Bank of Boston to such certificates, amounting to $250,000 of principal.

2. The decree also refers it to a master *pro hac vice* to examine, ascertain and report who are the holders other than the complainant of said certificates, and how much remains due and unpaid thereon. (Transcript of record, p. 35.)

In pursuance of this decree, as was found by the court in the case at bar, all the defendant certificate holders appeared before the master *pro hac vice* mentioned in the decree and produced their certificates and made proof of their title thereto and the amount due thereon. (47th finding, p. 503; see also report of master *pro hac vice*, transcript of record, pp. 486-490, in which the ownership by the defendants certificate holders of their several certificates is found by the master.)

The judgment authorizes the referee named therein to re-try the issue as to who are the holders of the said certificates upon the evidence and findings given in the United States Circuit Court, *and such other evidence as shall be furnished him*, thus opening the whole question as to the title to the receiver's certificates.

3. The decree directs a sale of the premises or such part thereof as shall be sufficient to satisfy the amount due and unpaid on said certificates and the expenses of the sale and the costs of the suit, by Worthington Frothingham, Esq., who is named as referee for that purpose.

The judgment restrains the certificate holders and each of them, and their and each of their officers, agents, servants and attorneys from proceeding with any action or proceeding in any court whatever to enforce the lien of the certificates and *from suffering* any such action to be brought or *to be prosecuted or to be proceeded with.* (Transcript, p. 113 print, 188 original.) Also perpetually enjoins and restrains the defendants, the certificate holders, from proceeding with the sale under the decree, and *from suffering the said sale to proceed* in their or any of their names or behalf. (P. 113 print, 189 original.)

4. The decree declares the certificates to be a lien on the premises and property described in the complaint in the hands of the defendants, and requires the premises to be sold by the referee therein named and the referee to pay therefrom to the complainant or its solicitors the amount due to it on its certificates, and to the other certificate holders the amount of the principal and interest due thereon as the same may be found and reported by the master *pro hac vice.*

The judgment directs a sale by the referee named therein subject to a debt which the receiver in this case had been authorized to contract to the amount of $20,000, the proceeds of such sale to be paid to the holders of the Lebanon Springs bonds as established by the report of the referee, except as to the proportions coming to the owners of such bonds as were in the Sackett suit, as the same shall be found by such report as confirmed, he shall pay so much thereof to the certificate holders as shall satisfy the same as the same shall be found by said report so confirmed, and the balance to the holders of such bonds. (P. 114 print, 190 original.)

5. The judgment makes the decree absolutely ineffectual and useless to the complainants in that suit. It directly and in unambiguous language enjoins the certificate holders, for whose benefit the suit in which the decree was rendered was brought from availing themselves of that decree or deriving any benefit from it. It, by enjoining them from suffering a sale to take place under that decree, in effect commands them to prevent the decree of the United States Circuit Court from being carried out and executed.

6. The decree adjudges and decrees that the defendants, Rowland N. Hazard and William Foster, Jr., pay to the complainant and the other of said certificate holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale

of said property and the application of the proceeds pursuant to the directions contained therein; adjudges and decrees that the complainant and the other of said certificate holders to be ascertained as aforesaid have execution therefor.

The judgment, by enjoining and forbidding the certificate holders, defendants in that action, not only from proceeding with the sale, but from suffering the sale to proceed in their or any of their names, prohibits the ascertaining of a deficiency and virtually annuls the decree that these defendants shall pay to the complainant and the other certificate holders, the residue of the indebtedness remaining unsatised after the sale of the property and from having execution therefor.

No case can be imagined in which a State court has made a more open and flagrant attempt to annul and hold for naught the decree of a Federal court, than is shown by a comparison of the decree of the Federal court with the subsequent judgment of the State court in this case.

POINTS OF PLAINTIFFS IN ERROR.

FIRST. THE COURT BELOW ERRED IN ATTEMPTING TO ENJOIN THE ENFORCEMENT OF A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES.

1. That such an attempt on the part of a State court is absolutely void and of no effect, is established by numerous dceisions of this court.

McKim v. Voorhis, 7 Cranch, 279.
Riggs v. Johnson County, 6 Wall. 166.
United States v. Council of Keokuk, 6 Wall. 514.
Mayor v. Lord, 9 Wall. 409.
Supervisors v. Durant, Id. 415.
Amy v. Supervisors, 11 Wall. 136.

See a fuller statement of these authorities in brief of plaintiffs in error in opposition to motion to dismiss or affirm, pp. 40 to 43.

2. Where jurisdiction has once been obtained by a Federal court over property, by being brought within its custody, it continues until the purpose of the seizure is accomplished and cannot be impaired or affected by any legislation of the State or by any proceedings subsequently commenced in the State court.

Rio Grande R. Co. v. Gomila, 132 U. S. 478.
Central National Bank v. Hazard, 49 Fed. Rep. 293.

Moran v. Sturges, 154 U. S. 256, reversing Matter of Schuyler Steam Tow Boat Co., 136 N. Y. 169.

See these authorities more fully set forth in brief in opposition to motion to dismiss or affirm, beginning near bottom of page 43 to page 46.

3. The court below had no right to inquire into the merits of the case which was decided by the Circuit Court of the United States.

Cresent City Live Stock Co. v. Butcher's Slaughter House Co., 120 U S. 141, 157, 158.

Covell v. Heyman, 111 U. S. 176.

See extract from case in 120 U. S. on pages 46 and 47 of brief in opposition to motion to dismiss or affirm.

SECOND. THE INJUNCTION CONTAINED IN THE JUDGMENT AGAINST THE ENFORCEMENT OF THE DECREE OF THE U. S. CIRCUIT COURT CANNOT BE SUSTAINED UPON THE GROUND TAKEN BY THE COURT OF APPEALS IN ITS OPINION, THAT THE COURT HAD AUTHORITY TO CONTROL ALL PERSONS AND THINGS WITHIN ITS OWN TERRITORIAL LIMITS, AND THAT THEREFORE THE COURT MIGHT ACT IN PERSONAM UPON THE PARTIES BEFORE IT, AND DIRECT THEM BY INJUNCTION TO PROCEED NO FURTHER WITH THAT SUIT. (See opinion, pp. 535, 536.)

The rule thus invoked has no application whatever to this case.

Most, if not all, of the cases in this court above cited were cases where the State courts had attempted not directly to enjoin the Federal court but to enjoin the successful parties in the Federal court from availing themselves of their judgment or decree.

Thus in Riggs v. Johnson County, 6 Wall. 166, the injunction granted by the Iowa State court was against the county officers enjoining them from levying a tax to pay the judgment in the Federal court, and this was held to be beyond the powers of the State court.

In United States v. Council of Keokuk, 6 Wall. 514, the injunction by the State court was directed to the defendants, the Common Council of Keokuk, enjoining them from levying a tax to pay the judgment in the Federal court. This injunction was held to be inoperative.

In The Mayor v. Lord, 9 Wall. 409, the injunction of the State court was against the mayor and alderman of the city of Davenport to restrain the said officers from levying a tax to pay certain bonds of the city upon which a creditor had recovered judgment against the city in a Federal court.

In Supervisors v. Durant, 9 Wall. 415, the injunction of the State court was against the supervisors of a county to prevent their levying a tax to

pay interest on bonds on which the relator had obtained judgment in the United States court.

So in Amy v. Supervisors, 11 Wall. 136, the injunction of the State court was against the supervisors to restrain them from levying a tax to pay the judgment obtained in the Federal court.

Indeed, it is too plain to require argument, that an injunction granted by a State court, whether by order or judgment, which undertakes to restrain the successful parties in a suit in the Federal court, which has proceeded to judgment or decree, from availing themselves of the judgment or decree, is in substance and effect a reversal and annulment of the judgment or decree itself. Nobody can enforce such judgment or decree but the party to the suit or action, who has succeeded. If a State court can, by its order or judgment, prohibit him from enforcing the judgment or decree in his favor, it can virtually reverse and annul the judgment of the United States court.

It is to be observed, also, that the judgment now under review, not only enjoins the certificate holders from proceeding with the sale under the decree, but undertakes to restrain them "from *suffering said sale to proceed* in their or any of their names or behalf."

The statement, therefore, of the learned counsel for the plaintiffs, that "there is nothing in the judgment which interferes with the decree or the

process of the officers of the United States court," is incorrect. The defendant certificate holders are commanded *not to suffer* the sale to proceed. In other words, they are commanded to prevent the sale, which the United States Circuit Court has commanded the referee to make. By this judgment, the Supreme Court of the State of New York commands the certificate holder defendants to *prevent* the referee named in the United States Circuit Court decree, who is an officer of that court, from obeying the mandate of the Federal court, that he shall proceed to sell. How can it be said that this is not an interference with the decree or with any officer of the United States Court?

THIRD. THE JUDGMENT BELOW CANNOT BE SUSTAINED ON THE GROUND THAT COURTS WILL SET ASIDE AS A NULLITY A JUDGMENT, DECREE OR AWARD OBTAINED BY FRAUD. (See opinion of the Court of Appeals, transcript of record, p. 537 print, 852 original.)

1. There is no pretense, nor a particle of evidence anywhere in the record, that the decree in the United States Circuit Court, the enforcement of which is enjoined by this judgment, was obtained by fraud. There is no pretense, nor a particle of evidence that the certificates held by the defendants

were not obtained and purchased by them in good faith. On the other hand, the court below found as a fact that the defendant, The Central National Bank of Boston, became the purchaser for value of receiver's certificates to the amount of $250,000, which the said bank now holds and owns. (36th finding, record, p. 500.)

It also finds that since the rendering of the decree, the defendants, who are the plaintiffs in error here, have duly appeared before the master *pro hac vice* mentioned in the decree of the United States Circuit Court, and produced their certificates, and made proof of their title thereto and the amount due thereon. (47th finding, record, p. 503.)

The only fraud pretended or alleged consists in the application of part of the avails of the receiver's certificates to the payment of claims and judgments of certain bondholders against the Lebanon Springs Railroad Company, which are summarized on page 110 of the record, but this court has held that purchasers of receiver's certificates are not bound to see to the application of the proceeds, as appears by the following extract from the opinion of the court in the case of the Union Trust Company v. Illinois Midland Co., 117 U. S. 434:

A question was made before the commissioner that he receiver did not faithfully apply the money as directed by the court. He held, and the Circuit

Court sustained him, that these purchasers were not bound to see to the application of the proceeds, citing the decision to that effect by Mr. Justice Woods, in Stanton v. Alabama & Chattanooga Railroad Co., 2 Woods, 506. In this view we concur.

It was also contended before the commissioner, that all that the holders of these certificates were equitably entitled to was the money they paid, and without interest, and not the face of the certificates and interest. The view taken by the commissioner and confirmed by the Circuit Court, was that, as the certificates were issued for debts contracted by the court, when it had jurisdiction of the parties and of the subject matter, to persons who, in good faith, invested their money for the benefit of the property in the possession of the court, the certificates should be paid according to their tenor as authorized. We concur in these views. It may be added that, as the orer of June 29, 1881, authorized the certificates to be sold at not more than ten per cent. discount, it must be presumed that the parties taking the certificates relied on the promise to pay their face, and would not otherwise have trusted the receiver or the fund. The court which made that order thought the limit of discount a reasonable one, and the certificates were sold within that limit. (Pp. 461, 462.)

It was also held in the above case that it was no objection to the rule that certificates issued for necessary repairs must be allowed priority that the suit in which the first receiver was appointed, was not brought by the bondholders or their trustee. (See head-note, p. 435.)

In this case the order contained no limit of discount, but the verbal instructions of the judge to the receiver, were that the certificates were not to be sold at less than eighty cents (p. 395), and it appears that sales were actually made at ninety cents (p. 396), and that all the money realized by the receiver from the second issue of certificates, except such as was used in redeeming the first issue, was expended upon the railroad and in the purchase of rolling stock, except as appears otherwise from Mr. Cadman's report. (See Van Valkenburgh's testimony, pp. 395-397.)

See, also, Kneeland v. Luce, 141 U. S. 491, 509.

2. The complaint in this action does not allege any fraud in the bringing or the conduct of the suit in which the decree of the United States Circuit Court was rendered. It does not ask for any relief as against said decree. There is no allegation in the complaint that the defendant, The Central National Bank of Boston, and the other certificate holders did not purchase their certificates in good faith. There is an allegation that they obtained them in the first instance for much less than their face value, but the complaint adds "under what circumstances or agreements plaintiff does not know." The prayer for relief does not ask for any injunction against enforcing the decree of the United States

Circuit Court, or to set aside that decree, or in any way to interfere with it. It does ask that the certificates may be adjudged to have been beyond the power of the court to issue, and to be of no validity except to bind the interest represented by the eight bonds of Marvin Sackett, and the interest of the defendants in that action, and it asks generally for an injunction to prevent the defendants from interfering with any part of the railroad or property; but there is no intimation that there was to be any relief as against the decree, although the fact that such a decree had passed is alleged in the 28th subdivision of the complaint. (Printed p. 22; see prayer for relief, printed p. 23.)

No court has been more emphatic in enforcing the rule that a judgment will not be sustained which is not *secundum allegata et probata* than the Court of Appeals of the State of New York.

Southwick v. 1st Nat. Bk. of Memphis, 84 N. Y. 420.
Day v. New Lots, 107 N. Y. 148, 154.
Romeyn v. Sickles, 108 N. Y. 650, 652.
Terry v. Munger, 121 N. Y. 161, 171.

3. But the argument is that the Sackett suit, under the judgmen in which the sale of the premises to Foster and Hazard was made, was fraudulent, and that, therefore, the title to the premises obtained by that sale was bad, and that by reason of

such fraud the Supreme Court of the State of New York had jurisdiction to enjoin the enforcement of the decree of the Federal court. The following is the language of the Court of Appeals on this subject:

It was after the decree of the United States Circuit Court was rendered that the Supreme Court of New York, sitting as a court of equity, assumed jurisdiction of all the parties connected with this long and complicated contest, and undertook to adjust their rights and interests.

In so doing, it rendered its judgment reviewing and reversing the Sackett judgment, setting aside the sale and referee's deed to Hazard and Foster under it, and enjoining the certificate holders from proceeding with the sale under the United States Circuit Court decree.

It is thus apparent that if a court of equity, having jurisdiction of all the parties, was to give complete relief in dealing with the entire subject matter, it must restrain the certificate holders from proceeding with the sale under the decree of the United States Circuit Court, as the foundations of that suit had been utterly swept away by the judgment in the action at bar. (Record, p. 535.)

But the alleged fraud in the Sackett suit was a matter of public record existing long before the commencement of the suit of the Central National Bank against Hazard and Foster and others, in which the decree was rendered. This is apparent from an inspection of the record in this case. The

facts constituting the alleged fraud are grouped together in the findings of fact contained in the judgment, and appear on pages 107 to 110 of the record. It appears from these findings that the payments made which are alleged to be fraudulent, were made pursuant to orders or judgments of the court after an investigation of the various claims of the parties made by a referee appointed by the court. These payments are grouped together on page 110. They were made pursuant to orders and judgments obtained in 1881. These orders and judgments were made by the Supreme Court of the State of New York, were never questioned, excepted to or appealed from by any party. The evidence on which these findings were made is documentary and to be found, pages 216-229 of the printed record. The orders and judgments of the Supreme Court of the State of New York for the payment of the various sums paid are therein set forth and are matters of record on the files of the Supreme Court in the county of Rensselaer. The suit in which the decree of the United States Circuit Court was rendered was brought in 1886 (see pages 468, 469, of printed record), was at issue as to all parties in May, 1886, was removed into the Circuit Court of the United States by the defendants in the suit in September, 1886 (record, p. 485), and the decree therein was passed on the 24th day of March, 1887. (Record, p. 34.) If this documentary evidence,

consisting of public records accessible to all the parties in that suit, constituted any defence to the suit of the Central National Bank against Hazard and Foster and others, the defendants in that suit should have availed themselves of it. It was not for a State court to undertake to annul and reverse the decree of the Federal court on the pretense that by reason of certain matters long before of public record, which were accessible and available to the parties defending that suit, the foundations for the decree in that suit had been "swept away."

The decree of the United States Circuit Court estopped the parties thereto not only as to every material matter within the issue, but also as to those matters, although not expressly determined, which are comprehended and involved in the language expressly stated and decided, whether they were or were not actually litigated or considered. This is the rule established by repeated decisions of the highest courts of the State of New York, and controlling on the courts of that State.

See Pray v. Hagaman, 98 N. Y. 351.
Jordan v. Van Epps, 85 N. Y. 427.
Lorillard v. Clyde, 122 N. Y. 41, 47.
Reich v. Cochran, decided by the Court of Appeals December 1, 1896, appearing in the Combined Official Series of New York State Reports, No. 188, December 19, 1896, and to appear in 151 N.Y. 122.

4. Even if fraud in obtaining the decree of the United States Circuit Court had been alleged and proved, the State court had no jurisdiction to grant an injunction or in any way to set aside or annul or modify such decree.

Judgments and decrees of the Circuit Courts of the United States are considered by this court as if within the protection of section 1 of article IV of the Constitution, although that relates, in terms, only to the judicial proceedings of other States. This court has held repeatedly that it is the duty of the State courts to give full faith and credit to judgments of the United States Circuit Courts on matters within their jurisdiction. As was said by this court in the case of the Crescent Live Stock Co. v. Butchers' Union, decided in 1887, in speaking of Circuit Courts of the United States:

Their judgment or decree, when rendered, is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defence, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves and may be carried into execution in due course of law to its full extent,

furnishing a complete protection to all who act in compliance with its mandate.

120 U. S. 157, 158.

This court had before laid down the rule that where a State court refuses to give effect to a judgment of a court of the United States, rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is raised which may be brought to this court for revision; that the case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up; and further, that although the refusal by the courts of one State to give effect to the decisions of the courts of another State is an infringement of a different article of the Constitution, namely, the first section of article IV, still that in either case, whether the validity or due effect of a judgment of the State court, or that of a judgment of the United States Court, is disallowed by a State court, the Constitution and laws furnish redress by a final appeal to this court.

Dupasseur v. Rochereau, 21 Wall. 130, 134.

It has also been laid down by this court that "the judgments of the courts of the United States have invariably been recognized as upon the same footing so far as concerns the obligation created by

them, with domestic judgments of the States wherever rendered and whenever sought to be enforced."

Embry v. Palmer, 107 U. S. 3, 10.

It was held by this court in 1866, that in an action upon the judgment of a State court in another State, a plea of fraud in obtaining the judgment could not be admitted as an answer.

Christmas v. Russell, 5 Wall. 290, 304, 305.

In the case last cited, it is said that the established rule is that so long as the judgment (of a sister State) remains in force, it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process mesne or final, as the case may be, to execute the judgment. (P. 305.)

See, also, following the doctrine of Christmas v. Russell, the following cases:

Green v. Van Buskirk, 7 Wall. 139.
Crapo v. Kelly, 16 Wall. 610, 637, 642.
Maxwell v. Stewart, 22 Wall. 77, 81.
Colt v. Colt, 111 U. S. 566, 578.
Hawley v. Donoghue, 116 U. S. 1, 4, 7.
Huntington v. Attrill, 146 U. S. 658, 685, 686.
Laing v. Rigney, 160 U. S. 531.

In Simmons v. Saul, 138 U. S. 439, it was held

that the judgment of a parish court of Louisiana within the sphere of its jurisdiction was binding upon the courts of the several States and of the United States, and that a Circuit Court of the United States, acting as a court of equity, would not entertain jurisdiction to set aside the granting of letters by such parish court on the ground of alleged fraud. See particularly pp. 458, 459, 460.

And in Kent v. Lake Superior Canal Co., 144 U. S. 75, where a bill in equity was filed in a State court, alleging fraud in obtaining a decree in a Circuit Court of the United States, and asking to set aside the alleged fraudulent decree, it was held that if there was error in the decree or in the sale under it, the remedy of the plaintiff was in the court which rendered the decree and confirmed the sale. (P. 88.) And it was laid down that if the appellant's remedy grew out of fraud, the remedy ought to have been sought in the court which rendered the decree and confirmed the sale. (P. 91.)

The case last cited is, upon this question, analogous to the case at bar as considered by the Court of Appeals, but in its facts stronger for the plaintiff below. The plaintiff brought his suit in the Supreme Court of the State of New York, alleging fraud in the obtaining of the decree in the Circuit Court of the United States, and asking to set aside

the decree or for relief from it; but a demurrer to the plea was sustained upon the grounds already stated. In this case the alleged fraud was not committed by the plaintiff in error, or in the suit in which they obtained their decree, but by other parties in a previous suit, and was proved only by the production of matters of public record, accessible to the defendants in the suit in which the decree was rendered.

It is respectfully submitted that these cases conclusively show that the ground taken by the Court of Appeals, as stated in Judge Bartlett's opinion on page 537 of the printed record, is entirely unsound, and cannot be sustained by this court.

FOURTH. THE JUDGMENT AT BAR CANNOT BE SUSTAINED AS A DECREE FOUNDED UPON A BILL OF REVIEW, OR UPON ANY OF THE AUTHORITIES CITED BELOW BY THE DEFENDANTS IN ERROR.

1. As has already been shown, there is no pretence of any fraud or any error in the decree rendered by the United States Circuit Court. The only fraud alleged or claimed is in the Sackett suit, which preceded, and such fraud occurred years before the suit was brought in which the United States Circuit Court decree was rendered.

2. The rule is laid down in section 1582 of Story's Equity Jurisprudence, as follows:

The only question of fraud which is opened to examination in a court of equity, as a ground for enjoining the judgment of any court having jurisdiction of the case, whether domestic or foreign, is such as intervened in the proceedings by which the judgment was obtained. All questions prior to the proceedings by which the judgment was obtained, are necessarily concluded by it.

3. The two cases principally relied upon by the defendants in error below, were Campbell v. Railroad Co., 1 Woods, 368, and Marshall v. Holmes, 141 U. S. 589. But neither of these cases aid the defendants in error.

(a) In the Campell case, the bill was filed in the same court which rendered the decree complained of. The fraud was plainly proved, and the court in the exercise of a jurisdiction which no one could question, held that it could review and reverse its own decree upon a bill of review for fraud in the obtaining of the decree complained of. It will be seen that the suit has no analogy whatever to that in which the judgment now before this court for review was rendered.

(b) The case of Marshall v. Holmes was also entirely unlike that now before the court. Indeed, that case, if applicable at all, is an authority for the plaintiffs in error. All that was decided in that case, was that the case had been duly removed into

the United States Circuit Court, and that all proceedings in the State court after the filing of the proper petition and bond were void. In the course of the opinion, certain propositions were laid down which were doubtless correct, but which have no application whatever to the case now before the court, because, as has already been clearly shown, there was no pretence of any fraud in the suit in which the decree, the execution of which is enjoined, was rendered.

The subsequent case of Kent v. Lake Superior Canal Co., 144 U. S. 75, above referred to, shows that the remarks made in the case in 141 U. S. can have no such meaning as is given to them by the counsel for the defendants in error.

4. Upon well-settled principles the plaintiffs below in this suit could not have filed a bill to review the decree of the U. S. Circuit Court. They were not parties to that suit, which was between the certificate holders, as plaintiffs below, represented by the Central National Bank of Boston, and Foster and Hazard, the purchasers under the judgment in the Sackett suit, who had assumed the payment of the certificates, and their grantees. The defendants in that suit could not have filed a bill of review unless they had first performed the decree. They did, in fact, petition the Circuit Court for leave to file such a bill, but their prayer was denied. Although this fact does not appear in this record,

its truth will not be questioned. The fact of their having done so is, however, immaterial, as any application for a bill of review should have been made to the court in which the decree was rendered. The principles governing such a bill have recently been laid down by the Circuit Court of Appeals for the Fourth Circuit in Hoffman v. Knox, 50 Fed. Rep. 484, reversing Knox v. Iron Co., 42 Fed. Rep. 378.

FIFTH. NO FACT HAS OCCURRED SINCE THE RENDITION OF THE DECREE WHICH MAKES IT INEQUITABLE OR IMPROPER TO ENFORCE IT.

1. It is not questioned that there are cases where something has arisen since the rendition of a decree or judgment which renders its enforcement inequitable, or that in such cases the parties holding the judgment or decree of the Federal court or a sister State court, may by reason of such subsequent facts be enjoined from enforcing it. This would be the case where the judgment or decree in question had been reversed upon appeal or where it had been paid or collected, and the party was seeking unjustly to enforce it a second time.

So where two parties claim the same fund, and one of the claimants was not made a party to the

suit in which the judgment or decree in question was rendered, as in

Barry v. Brune, 71 N. Y. 262.

But in this case, neither the complaint nor the proofs nor the findings show any facts arising since the decree impairing the obligations of the defendants in that suit to comply with the decree.

We are aware that the Court of Appeals says in its opinion that "the setting aside of the judgment in the Sackett suit, upon which the suit in the United States Circuit Court was founded, for fraud, was a *new fact* occurring since the decree in that court which gave jurisdiction in this action to enjoin proceedings thereon." (Record, pp. 535 & 536.)

But the court overlooked the fact above pointed out, that the alleged fraud in the Sackett suit was proved only by facts which were matters of public record long before the suit was begun in which the decree in the United States Circuit Court was rendered.

The above quoted language of the Court of Appeals utterly confounds the distinction between matters of fact and matters of law. The facts relied upon to establish fraud in the Sackett suit all existed, as has been before pointed out, long before the bringing or trial of the case in which the decree was rendered in the United States Circuit Court. As is shown in our brief in opposition to the motion

to dismiss or affirm on pages 54 to 57, if the doctrine of the Court of Appeals as above quoted is sound, there can never be anything conclusive in a judgment in a court of independent jurisdiction. If the court of the other jurisdiction desires to reverse and nullify a judgment or decree of the court first having jurisdiction, all that it has to do is to render a judgment in favor of some third person not a party to the first suit, setting aside and "wiping out" the contract, judgment or other transaction, which was the foundation of the first suit, and it may then reverse and annul the judgment or decree of the other jurisdiction on the pretense of a new fact, which consists of a provision of the very judgment which sets aside the decree of the independent jurisdiction. In other words, by inserting in the judgment which prohibits the enforcement of a Federal court decree, a provision "wiping out" the contract or judgment upon which that decree was rendered, the State court acquires jurisdiction to deprive parties who have obtained the decree in the Federal court from which they have not appealed, but which stands unreversed, unpaid and unperformed, of the benefit of that decree, and is enabled to do by indirection what the repeated decisions of this court running over a period of nearly a century, have held that a State court cannot do!

It has been claimed that the certificates which were the foundation of the suit in which the United

States Circuit Court rendered its decree, were annulled and "wiped out" by the judgment at bar. This is a mistake. On the contrary, the General Term of the New York Supreme Court expressly held upon the first appeal that the certificates were good as to the bondholders who were actually represented in the Sackett suit, and were binding upon them.

57 Hun, at pages 514, 515.

It is said by the learned court that the decree or judgment in favor of the Central National Bank of Boston, referring to the decree in the United States Circuit Court, was good against the defendants in that action. (P. 514.) Also that on the new trial, there would need to be an identification of the bondholders who were entitled to come in and share with the plaintiffs in this action, and that they were those who held aloof from the Sackett. action. (P. 515.)

The findings of fact in this case show that nearly all of the bondholders were represented in the Sackett suit. The judgment recites a finding that the Sackett suit was commenced at the request and with the concurrence of bondholders amounting to about $1,200,000 at their face value, and that counsel retained and acting for bondholders amounting to about $1,200,000 drew the original complaint at the request and with the concurrence of said

bondholders, inciuding Sackett; that one Edward Crane was the owner of bonds amounting to $700,000 face value and was represented in the Sackett suit at its beginning, and that other persons who were named as the owners of bonds to a very large amount were associated with Sackett in that suit and represented by the attorney and counsel who conducted the suit. (See judgment reciting findings of fact on page 109 of the printed record.) There is no evidence that any of the plaintiffs below "held aloof" from the Sackett suit or were not represented therein. (43rd finding, p. 502 of record.)

It is expressly held in this very case by the courts below that the certificates were good as to the bondholders who were actually represented in the Sackett suit, and were binding upon them. There is nothing in the judgment at bar (striking out the portions of which we complain) which is inconsistent with the fact that Foster and Hazard acquired by the sale to them under the judgment in the Sackett suit, title to an undivided part of the premises in question, bearing the same proportion to the whole premises as the number of bondholders represented in the Sackett suit bore to the entire number of bondholders, and that the receiver's certificates were valid to the same extent.

As has already been shown in the brief filed in opposition to the motion to dismiss or affirm (sixth point, pp. 58-63), the court below entirely misap-

prehended the effect of the decision and decree of the United States Circuit Court. This court is again referred to the opinion of that court reported 30 Fed. Rep. 484, and especially to the portion thereof quoted on pages 58, 59 and 60 of the brief in opposition to the motion to dismiss or affirm.

The opinion of Judge Wallace, upon which the decree in question was passed, puts the right of the complainants in that suit to recover, upon the ground that the defendants were purchasers at the sale under the judgment in the Sackett suit, and it is said by Judge Wallace, "It is wholly immaterial to them whether the certificates were or were not negotiated upon fair terms and for the best interest of the fund." He says that the purchasers at the sale under the decree and every person claiming under them are estopped from contesting the validity of the certificates or from questioning the amount for which the certificates were declared to be a lien upon the property purchased; that the defendants are privies to that judgment and concluded by it equally with the original parties to the suit.

SIXTH. THE COURT BELOW ERRED IN AFFIRMING THE PROVISION IN THE JUDGMENT THAT THE REFEREE THEREIN NAMED SHOULD ASCERTAIN, DETERMINE AND REPORT FROM THE EVIDENCE AND FINDINGS, AND SUCH EVIDENCE AS MIGHT BE FURNISHED HIM,

WHO ARE THE HOLDERS OF THE RECEIVER'S CERTIFICATES, AND IN REQUIRING THE HOLDERS OF SAID CERTIFICATES, INCLUDING THE PLAINTIFFS IN ERROR, TO PRODUCE THEIR CERTIFICATES BEFORE THE REFEREE, AT HIS OFFICE IN SARATOGA SPRINGS, OR AT SUCH OTHER PLACE AND AT SUCH TIMES AS HE MIGHT DESIGNATE, AND MAKE PROOF AS TO THEIR TITLE THERETO. (See assignments of error 5 and 6, transcript of record, p. 545; see also judgment, record, p. 115; also exceptions 41st to 47th inclusive, record, p. 511; 12th proposed conclusion of law, p. 506; exception to refusal to find same, exception 23rd, p. 512.)

The title of the plaintiffs in error to the respective certificates held by them was conclusively established by the decree of the United States Circuit Court. Neither the Supreme Court of the State of New York, nor any referee appointed by its judgment, had any authority or jurisdiction to review or re-open the question as to the title to those certificates.

SEVENTH. THE COURT BELOW ERRED IN REFUSING TO FIND, AS REQUESTED BY THE PLAINTIFFS IN ERROR, THAT THE RECEIVER'S CERTIFICATES HELD BY THE CENTRAL NATIONAL BANK OF BOSTON, PETER BUTLER AS RECEIVER, THE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

AND THE OTHER PERSONS WHO APPEARED BEFORE THE MASTER PRO HAC VICE AND PRODUCED THEIR CERTIFICATES, ARE, AS AGAINST ALL THE PARTIES TO THE ACTION, AND ALL THE HOLDERS OF THE SAID BONDS OF THE LEBANON SPRINGS RAILROAD COMPANY, INCLUDING THE PLAINTIFFS BELOW HEREIN, A FIRST LIEN UPON THE RAILROAD PREMISES DESCRIBED IN THE COMPLAINT, AS ADJUDGED BY THE CIRCUIT COURT OF THE UNITED STATES BY ITS DECREE. (See 7th assignment of error, record, pp. 545, 546 print; see also proposed conclusion of law 12th, and the exception to the refusal to find the same, pp. 506, 512.)

These exceptions raise the question as to how far the defendants in error, the plaintiffs below, were bound by the judgment in the Sackett suit, and by the deed therein to Foster and Hazard, the purchasers at the sale under the judgment in that suit, and the subsequent adjudication contained in the decree of the United States Circuit Court.

1. The suit of Sackett v. Root was a representative suit.

The plaintiff in that action represented not only himself, but all the other bondholders of the Lebanon Springs Railroad Company. There were two millions of dollars of these bonds in denominations of one thousand dollars each. The rights of these bondholders were all alike. This equality of

interest was recognized in the complaint in Sackett v. Root. No relief was therein prayed for, except on behalf of all the bondholders. (See complaint in Sackett suit, pp. 168 to 174 of record.) When the final judgment was rendered in that action, no relief was given to Sackett individually, but the relief was on behalf of all the bondholders alike. (See judgment, pp. 299 to 304.) It was in every sense a representative suit.

(1) The parties were evidently too numerous to be joined.

(2) They had a community of interest.

(3) The suit was for the benefit of all.

Kerr v. Blodgett, 48 N. Y. 62.

Thompson v. Brown, 4 Johns. Ch. 619, 638.

Wilder v. Keeler, 3 Paige, 164.

Brooks v. Gibbons, 4 Paige, 374.

Egberts v. Wood, 3 Paige, 517.

Travis v. Myers, 67 N. Y. 542.

Schuehle v. Reiman, 86 N. Y. 270, and see, especially, remarks of Danforth, J., on page 273.

In such cases where the complaint is so framed and the subsequent proceedings conform to the practice of the court, the other parties similarly situated to the plaintiff are bound by the proceed-

ings in the action, whether they come into the suit or not.

Kerr v. Blodgett, supra.
Schuehle v. Reiman, supra.

This principle has been frequently applied to the case of railroad bondholders.

Galveston R. R. Co. v. Cowdrey, 11 Wall. 459.
Ex parte Cutting, 94 U. S. 14.
Campbell v. R. R. Co., 1 Woods, 376.
Wilmer v. Atl. and R. A. L. Ry., 2 Woods, 450.

2. The representative character of the suit of Sackett v. Root, and the binding effect upon the other bondholders of the orders, proceedings and judgment therein, cannot successfully be denied on the ground that that suit was not fairly conducted or that Sackett's purpose was to use the suit fraudulently for his own profit.

(a) The allegation in the complaint in this suit in this respect is as follows:

That said suit, by said Sackett, was brought and conducted, not with the intention of realizing the said property for the benefit of the bondholders or any of them, or for himself, as a bondholder, but collusively and with the intent that he and others should receive large sums of money from the said

property under color of the payment of claims which, even if valid, were subordinate to said mortgages.

And with the intent that said railroad and property should be acquired by others free from the lien of said mortgages and without realizing anything to the holders of said bonds.

See complaint, par 26, p. 22 of record.

NOTE.—It would appear from the printed record as if this allegation was admitted by the answer of these defendants, because by the twelfth paragraph of our answer the allegations contained in the twenty-sixth paragraph of the complaint are admitted. But the allegations above quoted were not in the original complaint, but were added to paragraph twenty-six by amendment, as appears by the stipulation upon page 85, by which it is admitted that at the time of the service of the answer of the Central National Bank of Boston, the twenty-sixth paragraph of the complaint did not contain the allegations in regard to the intention of Sackett in bringing his suit, which are contained in the twenty-sixth paragraph of the third amended complaint, and is stipulated that the admission of the allegations contained in the twenty-sixth paragraph is to be considered as admitting only that portion of the twenty-sixth paragraph ending with the words, "allowances of the suit," and that the remaining part of said paragraph twenty-six shall be deemed as controverted under the second paragraph of the answer of the said defendant.

(b) There is nothing certainly in the complaint or in the judgment of the Sackett suit to sustain this claim on the part of the plaintiff. Plaintiff's counsel attempts to sustain it by referring to certain orders and proceedings in the Sackett suit. It is unnecessary to discuss the propriety of these orders and proceedings. They are not involved in this

action. It is enough to say that they were orders and proceedings of the court. The claims in question were heard before a respectable referee, the late Judge Strait, of Rensselaer county. The reports of the referee were confirmed by the Supreme Court. Nobody has, before this suit was brought, questioned these orders and proceedings. No appeal was ever taken from them or either of them. They are not open to review in this action.

(c) If this were a controversy between Marvin Sackett and the plaintiffs below, the case would be very different from the present one. The plaintiffs in error, whom we represent, appear here as holders of certificates issued by the order of the court, for which they paid value on the faith of the declaration contained in each certificate and in the order under which they were issued, that they should be a first lien upon the railroad and other property in the hands of the receiver. It would be monstrous to hold that their rights could be impaired if it could be proved that there were proceedings in that action, not connected with the issue of the certificates, of which they had no notice or knowledge, which were fraudulent or wrong. It is not claimed that there is any evidence whatever that any certificate holder was a party to any proceedings by which Marvin Sackett or anybody else improperly obtained any of the funds which were raised upon the certificates.

The order of the New York Supreme Court for the issuing of receiver's certificates was made after careful inquiry as to the condition and necessities of the road, made by an expert whose competency and integrity are unquestioned. (See recital in order, p. 31; order appointing expert, pp. 205, 206; report of expert. James H. Jones, pp. 210 to 212.) The plaintiffs in error on the faith of this order bought the certificates and advanced the money thereon without which the road could not have been kept running. Now the judgment of the courts of New York, if sustained, deprives them of the benefit of the order of the New York Supreme Court, under which they were issued, which provided that such certificates should be a first lien on the railroad premises (p. 32), and also of the benefit of the decree they obtained in the U. S. Circuit Court, because certain persons, without their knowledge, consent or connivance, are said to have improperly and fraudulently obtained some of the money which they paid for the certificates.

(d) The suit of Sackett v. Root was fairly conducted according to the practice of this court, within the meaning of the language used by the Court of Appeals in the case of Kerr v. Blodgett and Schuehle v. Reiman, above cited.

That suit was brought by Messrs. McClellan and Brown, as attorneys, and by Delos McCurdy, Esq.,

as counsel on behalf of parties representing more than a majority of the bonds. Edward Crane, who owned between $500,000 and $700,000 face value of the Lebanon Springs Railroad Company bonds, was consulted in regard to the Sackett suit, and was represented in that suit, as were numerous other persons owning bonds, aggregating nearly all of the issue of bonds. (P. 109 of record; see, also, 22nd and 27th findings made on request of plaintiffs in error, pp. 495, 496 & 497 of record.)

Application was made on behalf of some of the bondholders to be made parties to the suit. This application was denied. But the judge, in denying the motion of Bloodgood and others, used the following language:

"The plaintiff should not be embarrassed by having united with him on the record parties whose case he may not be able to sustain. At the same time, these parties who apply should have notice of every step in the case, so that they may protect their interests. An order may be made requiring all papers to be served on Mr. F. L. Westbrook, and allowing him as counsel to appear on trials, hearings and motions. T. R. W." (Twenty-third finding, p. 496.)

Thereupon an order was entered by the counsel for the applicants denying the motion to make the other bondholders parties, but providing that the plaintiff's attorneys should serve copies of all

papers and notices of every kind which should be served therein, upon Mr. F. L. Westbrook, "and he is hereby authorized and allowed to appear as counsel in behalf of the said bondholders upon all trials, hearings and motions herein." (See order, twenty-fourth finding, pp. 496, 497.) In pursuance of this order, all notices thereafter were served upon Mr. Westbrook, as attorney for the bondholders. (Twenty-sixth finding, p. 497.) And when the final decree was made, Mr. Hamilton Harris, at the request of Mr. Westbrook, and also at the request of other bondholders, appeared, and was recited as appearing for the bondholders other than the plaintiff (see recital in final judgment, at p. 300, reciting that the decree was made on hearing "Mr. Hamilton Harris, of counsel for the defendants, who have appeared in this action, and also of counsel for the bondholders of the Lebanon Springs Railroad Company, who have not been made parties to this action by name." (See, also, the testimony of Hamilton Harrs, p. 418.) F. L. Westbrook, Esq., the counsel named in this order, had appeared as counsel for the petitioning bondholders upon the motion. (Twenty-fifth finding, p. 497.) The order providing for notice upon him was entered by the attorney of record for the petitioning bondholders, was acquiesced in by them, was never appealed from or in any way questioned by any bondholder. (See the testimony of

Frederick L. Westbrook beginning at pp. 455 to 462.) It is submitted that by this order, acquiesced in by the bondholders, they became practically, although not by name, parties to the suit. Their counsel had notice of all proceedings (twenty-sixth finding), and by the order, had a right to appear. They had precisely the same standing in the suit that the Central National Bank obtained under its petition and the stipulation thereupon made, the substance of which appears on pages 444 & 445 of the record, under which its attorneys are recited in the judgment as appearing in the same manner that Mr. Harris appeared for the bondholders, and by which the bank was enabled to protect its interests and the interests of the other certificate holders in the judgment in the action.

It does not appear that any bondholder was excluded from taking part in the Sackett suit or from being heard therein. The relief which was given by the judgment was, as has already been stated, for the benefit of all the bondholders, without any partiality or preference. If, by certain interlocutory proceedings therein, some persons, including the plaintiff in that suit, were enabled to get an advantage, it is enough to say that such proceedings were not questioned by any bondholders, and that the certificate holders, who were as ignorant as possible in relation to such proceedings, are not responsible therefor. The principal parties

who received the moneys awarded by the judgment and order complained of, are not parties to this suit. (See their names on p. 110 of the record.) For anything that appears they were reponsible. If they obtained the moneys paid to them fraudulently or illegally, the remedy of the bondholders was by direct proceedings against these parties in that suit or otherwise.

(e) It was contended by the defendants in error below and virtually held by the courts of the State of New York, that if the orders and judgments in the Sackett suit were improperly granted, they are not binding upon the other bondholders, and that the plaintiffs below, although it is not proved that their bonds were not represented in the Sackett suit, are not bound by such orders or by the judgment in that suit. There are several answers to this contention.

(1) The court below had no power, collaterally, to assail or inquire into the proceedings and judgment in the Sackett suit. In the language of the N. Y. Commission of Appeals in Kerr v. Blodgett, "the judgment is conclusive against these plaintiffs, unless they were able to show some fraud or misconduct on the part of these defendants *in suffering the judgment.* It cannot be collaterally assailed or inquired into."

48 N. Y. at p. 69, Leonard, C.

(2) The meaning of the expressions used in some cases in regard to the suit being "fairly conducted," is that in a representative suit the proceedings, so far as they purport to be conducted in the interest of all those represented, are binding upon all the parties thus represented. In the language of the N. Y. Court of Appeals in a recent case: "Where the complaint is so framed and the subsequent proceedings conform to the practice of the court, such other parties, whether they come in or not, will be bound by the judgment or other act of the court."

Schuehle v. Reiman, 86 N. Y. 270, 273.

For instance, if the judgments or orders referred to by plaintiff's counsel, and found by the court below, which require the payment to Sackett of the sum of $796.80, to his attorneys $1,200, to Mr. Taylor of $2,500, and to Mr. Tilden of $23,967.37, were improper and unfair, it was entirely competent for the other bondholders, or any of them, to apply *in that suit* to vacate such orders and judgments, and in case such application had been denied, to appeal from the order of denial, and in that action to have judgment for restitution against any parties who had improperly obtained a part of the fund which should have been equally shared by bondholders. It is not necessary that a person interested should be a nominal party to the suit in order to have a right to be heard and to appeal

from such an order. This has been repeatedly held by the courts of New York.

Hobart v. Hobart, 23 Hun, 384.

In the Matter of Attorney-General v. N. A. Life Ins. Co., 77 N. Y. 297, 299, 300.

Lewis v. Jones, 50 Barb. 645, 673.

The decision of Judge Westbrook, and the order entered by the counsel for the bondholders, by which the counsel for the other bondholders was expressly "authorized and allowed to appear as counsel in behalf of said bondholders upon all trials, hearings and motions herein," show that the court intended that the rights of all bondholders should be protected in that action. This privilege, secured by that order, necessarily involved the right of review, by appeal or otherwise, in case any of such bondholders deemed themselves aggrieved by any order or judgment in that suit.

(3) No evidence whatever, outside the record, has been given to show any fraudulent intent on the part of Sackett. Upon the record, the New York Supreme Court has once adjudged that the receiver's certificates were legally issued, and were a first lien upon the road, and that the holders thereof were entitled to recover the full face value thereof, with interest. The Circuit Court of the United States has rendered a similar judgment.

The Supreme Court of New York, upon the same evidence which had been held by it and by the Circuit Court of the United States sufficient to entitle the certificate holders to a judgment for the payment of their certificates in full, with interest, has held in this action that the certificates are invalid as against the plaintiffs below, who were constructive parties to the Sackett suit, and under all the authorities bound by the adjudications therein.

3. The plaintiffs below are estopped by the judgments of New York Supreme Court in the Sackett suit, and the decree of the United States Circuit Court in the suit of the Central Bank v. Foster and Hazard and others, from denying the validity of the certificates.

(a) The judgment in the Sackett suit being binding upon all the holders of the Lebanon Springs Railroad bonds, the sale thereunder also bound all such bondholders; and Hazard and Foster, as the purchasers under such sale, acquired all the rights of such bondholders in and to the premises in question.

(b) Foster and Hazard, the purchasers, having questioned the rights of some of the certificate holders, an action was brought in the New York Supreme Court against said purchasers and their

grantees, by the Central National Bank of Boston, as the holder of said certificates to the amount of $250,000, par value, for itself and other certificate holders, and which action was removed by the defendants therein into the United States Circuit Court, was tried there and a decree rendered establishing the validity of the certificates as a first lien upon the premises.

This judgment was also binding upon the bondholders, the defendants in that judgment having acquired all their rights by the sale to Foster and Hazard under the judgment in the Sackett suit.

4. Irrespective of these judgments, the receiver's certificates were and are a first lien upon the premises in question.

(a) Plaintiffs' counsel claims that they are not such first lien, by reason (1) of the five million mortgage to Park and Duncan; (2) of the mortgages issued by the New York, Boston and Montreal Railway Company, amounting to a fabulous number of millions of dollars, which are termed by the counsel, "French mortgages."

(b) It is true that Park and Duncan were not parties to the Sackett suit, and, therefore, were not, except so far as they were bondholders, bound by the judgment therein. But they, or their repre-

sentatives, are parties to this suit, and it has been conclusively proved that the five million mortgage was entirely without consideration. This is demonstrated by the testimony of Mr. Duncan, and is found as a fact by the court. (50th finding, pp. 503, 504.) Hull and Lincoln were not necessary parties, because they had conveyed before the Sackett suit was brought. The New York, Boston and Montreal Railway Company was a defendant in the Sackett suit, and so was its receiver. Park and Duncan were not parties, but the so-called five million mortgage having been entirely without consideration, as to the bondholders, and all parties at that time interested in the railroad premises, was utterly void.

(c) But it seems that Park and Duncan, or the New York, Boston and Montreal Railway Company, negotiated the bonds of the railway company, secured by subsequent mortgages, in France to a large amount; counsel for defendants in error claims to the amount of eight millions of dollars, and that out of this, $807,077.05 was paid to Park and Dnncan upon the five million mortgage. Hence, by some curious logic, it is argued that the Park and Duncan mortgage became good for $4,192,-923.95.

But, assuming that the facts are as claimed by plaintiffs below, what is the result? The title of

the New York, Boston and Montreal Railway Company was subject to the payment of the five million dollar mortgage. Although this mortgage was void as to the bondholders, the railway company, upon well settled principles, having accepted the deed which was made subject thereto, could not be permitted to question it.

Freeman v. Auld, 44 N. Y. 50.
Frederick v. Brewster, 26 Hun, 236.
Horton v. Davis, 26 N. Y. 495.
Parkinson v. Sherman, 74 N. Y. 88.

The mortgages issued by the railway company, called by plaintiff's counsel the "French mortgages," were issued as second mortgages, and subject to the payment of the five million mortgage. The lien, if any, created by these mortgages, was subject to a prior lien of five millions of dollars.

As has been shown, neither Hull and Lincoln, nor the New York, Boston and Montreal Railway Company, had any title to the premises in question as against the bondholders. The railway company could, therefore, give no title better than it had, to the mortgagees. But the right which the French bondholders probably supposed they acquired, and which they did acquire as against the New York, Boston and Montreal Railway Company, was subject to a prior mortgage of $5,000,000. These premises, it must be remembered, at public sale,

have never brought to exceed about half a million of dollars. They were sold in 1873, the New York part by Mr. Fairchild, as referee, for $100,000, the Vermont part, under the decree in that State, for $50,000. In the Sackett suit they were sold at $155,000, subject to the payment of certificates, assumed by the purchasers, amounting to $350,000, making, in all, the consideration of that purchase $505,000. The value of a second mortgage upon these premises, subject to a prior mortgage of $5,000,000, is certainly not very apparent. The situation as to the certificate holders is this: The French bondholders have no lien or right whatever, except subject to the mortgage for $5,000,000 held by Park and Duncan. That mortgage, as against the Lebanon Springs bondholders, is void; or, what is the same thing, it belongs to them, or, in the language of counsel for defendants in error, is impressed with a trust in their favor, and they must be paid to the extent of the amount of their bonds before anything can be paid from the proceeds of any sale to the holders of bonds secured by the so-called "French mortgages." Now, the Lebanon Springs bondholders were the parties plaintiff in the Sackett suit. These certificates were issued for their benefit and in their behalf. They constitute a first lien upon the premises as against such bondholders. Inasmuch, therefore, as only the Lebanon Springs bondholders have any rights to the five

million mortgage, and as the certificate holders have a right prior to the Lebanon Springs bondholders, it follows that, as against the five million mortgage, as against the Lebanon Springs Railroad bondholders, as against the French bondholders, the certificate holders have a first lien— a lien which is behind nothing, and which should have been recognized and adjudged in this case.

(d) But the counsel for the plaintiffs below relied especially upon the New York case of Raht v. Attrill, 106 N. Y. 423, decided by the Court of Appeals in October, 1887; but that case related to certificates issued by the receiver of a hotel property, and the court recognized the difference between the two kinds of corporations, saying that in the cases decided by this court, the jurisdiction was largely based upon the public character of railroad corporations, the public interest in their continued and successful operation, and the peculiar character and terms of railroad mortgages, and upon other special grounds not applicable to ordinary private corporations. (P. 436.)

This court has repeatedly laid down the rule from which it has not varied, in regard to the priority of receiver's certificates.

A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate and decay and perish, if not cared for

and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given, not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations must necessarily be held to do so in the view that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent nor on prior notice. Consent is desirable, but is seldom practicable, where the debts exceed the value of the property. Though prior notice to persons interested by notifying them as parties, first requiring them to be made parties if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity, as in this case, to be heard on evidence, as to the propriety of the expenditures and of making them a first lien, is judicially equivalent.

Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 455, 456.

Sage v. Memphis, &c., R. Co., 125 U. S. 361.

See, also, Kneeland v. Luce, 141 U. S. 491, 509, in which the case of Union Trust Co. v. Illinois Midland Ry. is followed, and it is said that the certificate holders had a right to rely on the promise of the court as to their priority plainly apparent on their face. (P. 509.)

See, also, remarks of Fuller, C. J., in Finance Co. v. Charleston, &c., R. Co., 62 Fed. Rep. 205, 208.

(e) When the Sackett suit was brought, the premises in question had been abandoned. Neither the New York, Boston and Montreal Railway Company, nor its receiver, was in possession. (19th finding, p. 495.) The property and franchises of the road were in use and occupation of persons having no right or authority therein. The last two occupants were Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company, neither of which had, or claimed to have, any authority or right to use or occupy the said railroad or its property, or any part thereof, derived from any person or persons having a right to grant such authority. (See the eighteenth, nineteenth and twentieth findings of fact in the Sackett suit, which are binding upon the bondholders, p. 495, and see, also, the testimony of Trenor W. Park, at pp. 323 to 325.) It appears by Park's testimony that Root was put in possession

by Mr. Bloodgood, who was one of the bondholders. (P. 323.) In the language of Mr. Park, "he was not even a lessee, he had no title to it, no bonds in it, no stock in it, and no lease of it." (P. 325.)

Under these circumstances it is not surprising that the road was permitted to go to decay. The extent of this decay and of the depreciation of the road appears from the report of James H. Jones, the expert appointed by the court. (Pp. 210 to 212.) This being the condition of things, the doctrine laid down by this court in 117 U. S., above quoted, has special force. It was the duty of the court to make such repairs as were necessary to keep the road and its structures in a proper condition to serve the public. Its power to do this did not depend upon consent nor on prior notice.

At this period, plaintiffs below and their counsel were not heard of; neither the French bondholders nor their trustees were heard of; the Union Trust Company, the trustee of the Lebanon Springs bondholders, was not heard of. It evidently considered its duty as accomplished, and itself *functus officio*. Mr. Sackett, in behalf of the bondholders, for whose benefit the purchases by Duncan and Park were made, who were the parties beneficially interested in Hull and Lincoln's title, called the attention of the court to this condition of things, and upon being satisfied that the necessities of the case required it, the order for the issuance of

receiver's certificates was made. If there was ever a case where the exercise of the powers of a court of equity, as so often recognized by this court as well as by the New York Court of Appeals, was not only justified, but demanded, this was such a case. The certificates thus issued became a first lien upon the property in question, without reference to the parties to the action or to any question of notice or consent; at all events the circumstances of the case were, in the language of this court, in 117 U. S., above quoted, "judicially equivalent to prior notice."

5. The plaintiffs below have no interest whatever in the premises described in the complaint, and their complaint should, for that reason, have been dismissed upon the merits.

(a) It has already been shown that the proceedings and judgment in the Sackett suit bound all the holders of Lebanon Springs Railroad bonds. The sale under that judgment was also, of course, binding upon such bondholders. All their right, title and interest in the premises in question were sold and conveyed under the decree to Hazard and Foster, who thus became seized and possessed of all such right and interest. The judgment in the United States Circuit Court against Foster and Hazard, who represented the former interest of the

bondholders and their grantees, was also binding and conclusive upon the defendants in error, the plaintiffs below. The effect of the purchase by Foster and Hazard was to give to them a good and sufficient title to the premises described in the complaint, subject to the payment of the receiver's certificates as against all the parties to this action.

(b) The fact that one of the plaintiffs below, Stevens, held some Harlem Extension bonds, gives him no right to maintain this action.

These bonds are confessedly subsequent to, and subject to, the bonds of the Lebanon Springs Railroad Company, amounting to $2,000,000, secured by a first mortgage on the premises. These bonds were cut off by the judgment in the foreclosure suit of the Union Trust Company against the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company and others, a copy of which is set forth in the complaint, and may be found on pages 11 & 12.

This judgment contains the provision:

"It is further adjudged that the defendants, and all persons claiming under them, or any or either of them, after the filing of the aforesaid notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof." (P. 12.)

The trustee for the Harlem Extension bonds was

the Union Trust Company of New York, which was also the trustee for the Lebanon Springs Railroad bondholders. This judgment was followed by a sale, and a conveyance by the referee named therein, to James C. Hull. That conveyance was not void, but it was for the benefit of the bondholders of the Lebanon Springs Railroad Company, and vested the right to a title in them. (See 1st, 2nd, 3rd & 4th conclusions of law in the decision in the Sackett suit. (P. 298.)

The conveyance by the referee to Hull, in accordance with the directions of Duncan, merely vested the title in Hull, as trustee for the bondholders, in whom the beneficial interest still remains. (Id.)

These findings and the judgment rendered thereon in the Sackett suit are binding upon the holders of the Lebanon Springs Railroad Company's bonds, of one of whom Mr. Stevens claims to be the successor.

The plaintiff has no bonds which were acquired by him earlier than November, 1886. (P. 439.)

The Harlem Extension bonds are confessedly subject to and behind the bonds issued by the Lebanon Springs Railroad Company.

The receiver's certificates, as has already been shown, are a first lien against the holders of the Lebanon Springs bonds; in other words, have a priority over them.

And yet it was contended by the counsel for

plaintiffs below that the certificates are "certainly behind the Harlem Extension mortgage." He said that the Harlem Extension bondholders are in exactly the same position as if there had been no sale, since there is to be a re-sale, and to sustain this extraordinary position he cites Cheney v. Woodruff, 45 N. Y. 98, 101.

Looking at that case, it will be seen that all it decides is that the purchaser at a mortgage foreclosure sale is not entitled to the rent of the premises accruing between the time of the purchase and the time of the delivery of the deed to him. There was no question of a re-sale in that case, nor was there anything decided which can, by any possibility, be construed as sustaining the position that a second mortgage, after a sale of the premises under the first mortgage upon a decree in foreclosure, at which sale the premises bring only a small fraction of the amount of the first mortgage, is not only not foreclosed, but, by some extraordinary process of legerdemain, instead of remaining behind the first mortgage, is put in front of and before receiver's certificates, which are confessedly ahead of the first mortgage.

The good faith and equity of the plaintiff below, Stevens, are well illustrated by the facts that this claim is seriously made on his behalf as a Harlem Extension bondholder, though it is conceded he has no bonds which were acquired by him before

November, 1886; that the Lebanon Springs Railroad bonds were regarded as worthless before the commencement of the Sackett suit by as able a financier as Mr. Augustus Schell; that the said Harlem Extension bonds were acquired by plaintiff long after the issuing of $350,000 receiver's certificates, after the premises had been sold, first for $150,000, and afterwards for $500,000, and that there had been no sane man, with any knowledge of the circumstances, who had regarded the Harlem Extension bonds as, by any possibility, worth any sum whatever for, at least, twelve years before the "acquisition" of some of them by Stevens.

(c) Whether the title of Foster and Hazard and their grantees is subject to any equitable right of redemption in favor of the five million mortgage, or of the holders of the bonds subsequent thereto, negotiated in Europe, is a matter with which the plaintiffs below have no possible concern. They represent no bondholders, except the holders of the old Lebanon Springs bonds issued under the two million mortgage and of the foreclosed Harlem Extension bonds. They have no standing to assert any claims on behalf of the holders of the bonds of the New York, Boston and Montreal Railway Company, nor have they any standing in court to try to patch up the title of Foster and Hazard or the

New York, Rutland and Montreal Railway Company, or the holders of bonds issued by said last named company. These parties are represented in this suit, and they do not, in their answer, complain of the judgment in the Sackett suit or of the decree of the United States Circuit Court.

6. No question can be raised in this action as to the amount due on the receiver's certificates.

(a) Certainly the defendants in error can raise no such question, for, as has been already shown, they have no interest in the premises nor any standing in court to question the rights of the certificate holders.

(b) Foster and Hazard and their grantees cannot question such right, because it has been adjudged in the suit in the United States Circuit Court, to which they and their grantees were parties; nor do they, by their pleadings, attempt to do so in this action.

EIGHTH. THE COURT BELOW ERRED IN REFUSING TO FIND, AS REQUESTED BY THE PLAINTIFFS IN ERROR, THAT IF ANY SALE BE MADE UNDER THE JUDGMENT IN THIS ACTION, SUCH SALE SHOULD BE MADE SUBJECT TO THE RIGHTS OF THE CENTRAL NATIONAL BANK OF BOSTON AND THE OTHER CERTIFI-

CATE HOLDERS, PLAINTIFFS IN ERROR HERE, AND THAT SUCH CERTIFICATES SHOULD BE PAID TO SAID CERTIFICATE HOLDERS FIRST OUT OF THE PROCEEDS OF ANY SALE THAT MIGHT BE HAD THEREON. (See 8th assignment of error, p. 546; see also 15th proposed conclusion of law, p. 507; 31st exception, record, p. 513.)

If there was any defect in the title of Foster and Hazard by reason of defect of parties in the Sackett suit, plaintiffs in error were entirely willing that it should be corrected by a judgment in this action, and a sale under such judgment; but they insisted that such sale should be subject to their rights under the decree. There would have been no difficulty or embarrassment in such a direction. The sale under the judgment of the New York Supreme Court would have been in effect confirmatory of the title given by the sale in the Sackett suit, and the sale to be had under the decree of the United States Circuit Court. This was in substance what was actually done. Foster purchased at the sale under the decree and then again at the sale under the judgment. He held both titles and conveyed them by his deed to the Lebanon Springs Railroad. He thus took and conveyed perfect title to the premises which he and Hazard had bought at the sale under the judgment in the Sackett suit. If in consequence of the embarrassment and doubt

thrown upon his first title by the bringing of this suit, which was evidently, as has been shown in the brief filed in opposition to the motion to dismiss or affirm, been conducted solely for his benefit, he has succeeded in getting the confirmatory deeds at small cost and expense, this is certainly no reason why he should be excused or protected by the judgment at bar from paying the receiver's certificates which, by the terms of his purchase in the Sackett suit, he and Hazard agreed to pay, and which, by the decree of the United States Circuit Court, they were made personally liable to pay, provided the proceeds of the sale under the decree should be insufficient to pay them.

NINTH. NOTHING HAS OCCURRED SINCE THE JUDGMENT WHICH AFFECTS THE RIGHT OR INTEREST OF PLAINTIFFS IN ERROR IN OR TO A REVERSAL.

This is demonstrated in the Eighth Point of our brief in opposition to the motion to dismiss or affirm. (P. 65 et seq.)

Plaintiffs in error are still vitally interested in reversing those portions of the judgment which interfere with their rights under the decree.

The same counsel who here is maintaining that we have no interest in obtaining a reversal of the judgment so far as it affects our rights under the

decree, is pressing in the U. S. Circuit Court a suit based upon this judgment, to restrain the certificate holders from enforcing that decree by issuing execution against Foster and Hazard, and the Court of Appeals say that our sale was "without force or effect as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment." (See brief in opposition to motion to dismiss, &c., p. 77.)

On the other hand, the plaintiffs below have nothing to lose by the reversal of the parts of the judgment of which we complain. Their title as well as ours was sold and conveyed to Foster, and by him to the L. S. Railroad. The only parties interested in maintaining the judgment in its present shape, are Foster and Hazard, who are liable for a deficiency under the decree, and who joined in opposing the plaintiffs below.

TENTH. The portions of the judgment referred to in the assignment of errors, namely, the part thereof perpetually enjoining and restraining the certificate holders from proceeding in any court whatever to enforce any lien upon or for the sale of the premises, and from suffering any such action or proceeding to be brought or prosecuted in their names; the portion thereof perpetually enjoining and restraining said certificate holders from pro-

ceeding with the sale under the decree, and from suffering said sale to proceed in their or any of their names or behalf; the portion thereof making the sale subject to a debt of $20,000 authorized in this action; the portion thereof authorizing the referee named therein to take evidence as to the ownership of the receiver's certificates and to determine from the evidence and findings and from such other evidence as might be furnished him, who are the holders of such certificates and all portions of the judgment which in any way interfere with or reverse or nullify or set aside in whole or in part, the decree of the United States Circuit court above referred to, should be reversed, and the cause remanded to the State court with directions to strike out such reversed portions of the judgment from the judgment, and to take such further proceedings in conformity with the rights of the plaintiffs in error as established by the decree of the United States Circuit Court, as may be just and proper. Costs should be awarded to the plaintiffs in error against those defendants in error who were plaintiffs below.

All of which is respectfully submitted.

Dated February 1, 1897.

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